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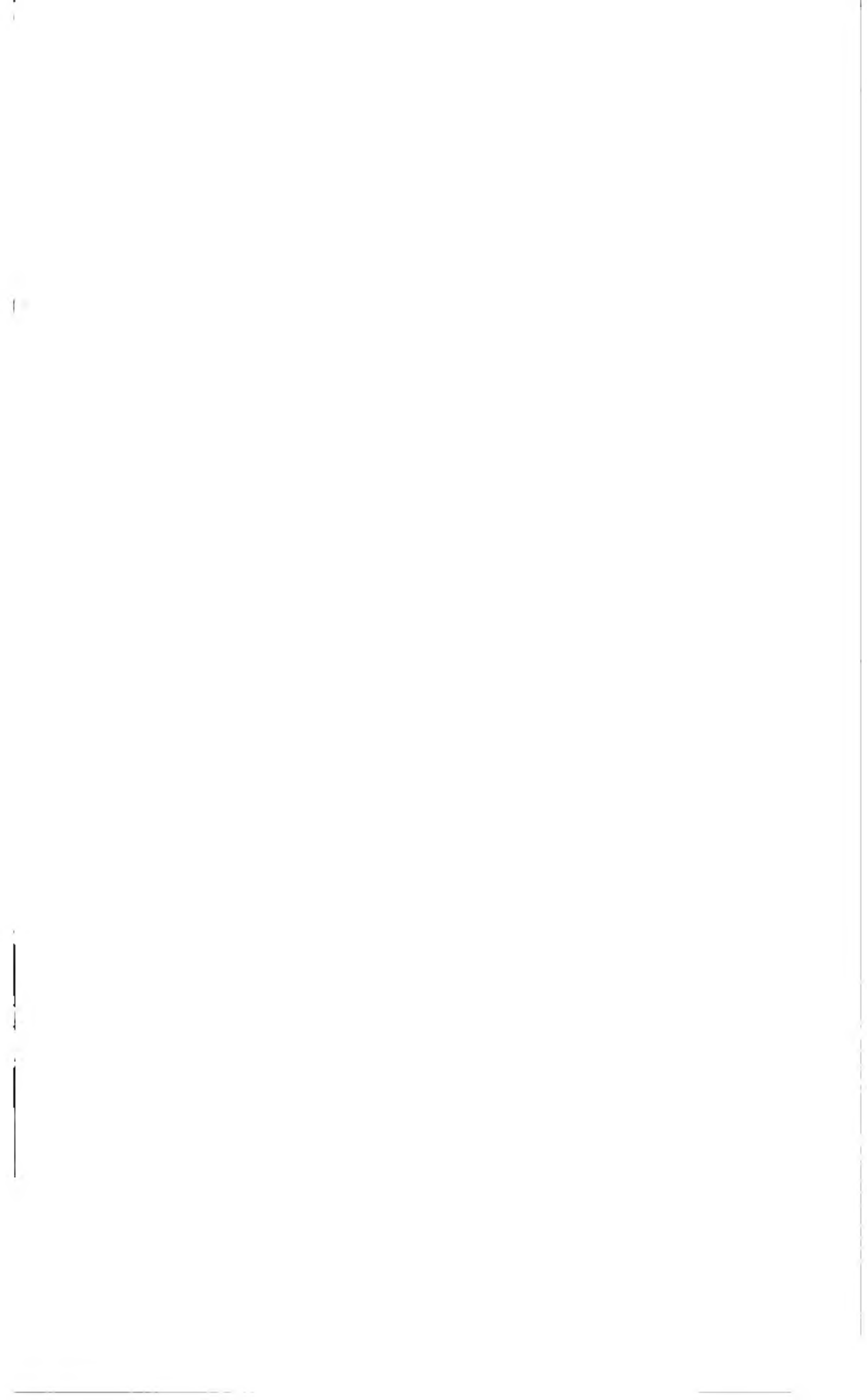
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REPORTS OF CASES
HEARD AND DECIDED IN THE
HOUSE OF LORDS

ON
APPEALS AND WRITS OF ERROR,
AND CLAIMS OF PEERAGE,

DURING THE SESSIONS
1843 AND 1844.

By C. CLARK AND W. FINNELLY, ESQRS.,
BARRISTERS AT LAW.

EDITED,
WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY
J. C. PERKINS.

VOL. X.

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1874.

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MEMORANDA.

IN the vacation between Hilary and Easter Terms, 1844, Lord ABINGER, Lord Chief Baron of the Court of Exchequer, died, while going the Norfolk Circuit.

Sir Frederick Pollock, Knight, her Majesty's Attorney-General, was appointed Lord Chief Baron of the Court of Exchequer, and took his seat in that Court in Easter Term, and was also sworn of her Majesty's Most Honourable Privy Council.

In the same term, Sir William Webb Follett, Knight, her Majesty's Solicitor-General, was appointed Attorney-General. Frederick Thesiger, Esq., was at the same time appointed her Majesty's Solicitor-General, and received the honour of knighthood.

**CHIEF JUDGES AND LAW OFFICERS DURING
THE PERIOD OF THESE REPORTS.**

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**MASTER OF THE ROLLS.
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CASES
IN THE
HOUSE OF LORDS.

CASES

IN THE

HOUSE OF LORDS

ON APPEALS AND WRITS OF ERROR.

WILLIAMSON v. THE ADVOCATE-GENERAL.

1843.

WILHELMINA BOYD ROBERTSON WIL-	}	<i>Plaintiff in Error.</i>
LIAMSON		
THE ADVOCATE-GENERAL OF SCOTLAND		<i>Defendant in Error.</i>

Will. Direction to Sell. Legacy Duty.

A testator devised, by two testamentary papers, his real and personal estates to trustees. In the first paper he declared the trusts, and among others he created a power of sale in the following terms : “ To sell and dispose of the lands, mills, teinds, woods, fishings, messuages, tenements, and hereditaments, and others hereby generally and particularly disposed to them, &c., on such conditions and at such prices as they shall think fit.” To render these sales effectual, he granted full power to convey, &c. The paper then went on thus : “ Declaring always, &c., that my said trustees shall by their acceptance hereof be bound and obliged, after the sale of the said lands, teinds, and others before disposed, which I recommend to them to be done as soon as convenient after this trust opens upon them, to satisfy and pay all my lawful and just debts,” &c. By a second testamentary paper reciting the first, he said that by the recited paper he had disposed of his heritable and movable estates to trustees on the trusts therein mentioned, and “ amongst others, my trustees are required to turn my means and

effects, thereby conveyed in trust, into money ;” and he gave directions accordingly. He further directed, that in case he should die leaving an heir of his body, his trustees should employ the trust funds for the use of such heir ; and that as soon as such heir should attain majority or be married, the trustees should “denude themselves of the whole trust and funds” in favour of such heir, but to return to the trustees in case of failure of heirs of his body, without disposing of the same.

Held, that the testamentary papers must be construed as amount-
 *2 ing *not merely to a power of sale for the purposes of the trust, but to a direction to sell in case the testator should die without leaving any heir of his body living at the time of his death.
Held, therefore, that though in fact the real estate was not sold, the positive direction to sell rendered it liable to the legacy duty.¹

March 16, 17, 1843.

THIS was a writ of error from the Court of Exchequer in Scotland, upon a judgment delivered there, by which the plaintiff in error was declared liable to the payment of the sum of 2500*l.* for legacy duty, accruing due to the Crown under the following circumstances, as stated in the form of a special verdict: Archibald Robertson, of Lawers, in the county of Perth, a major-general in the army, was possessed of considerable real and personal property, and, in the year 1799, duly executed a testamentary paper, disposing of his property, in which there were, among many others, the following clauses : —

“I, Major-General Archibald Robertson, of Lawers, for certain weighty causes and considerations me moving, do hereby assign, dispoⁿe, convey, and make over, under the conditions, provisions, and reservations after specified, and in trust always for the uses, ends, and purposes after mentioned, to and in favour of ” (certain persons in the deed named),

¹ See *Wurts v. Page*, 4 Green (N. J.), 365; *Ex parte McBee*, 63 N. C. 332; *Green v. Johnson*, 4 Bush (Ky.), 164; *Harris v. Slaght*, 46 Barb. 470; *Brolasky v. Gally*, 51 Penn. St. 509; *Dyer v. Cornell*, 4 Penn. St. 359; *Grider v. M'Clay*, 11 Serg. & R. 224; *Pennell's App.* 20 Penn. St. 515; *Bramhall v. Ferris*, 4 Kernan (N. Y.), 41; *Wright v. Trustees Meth. Epis. Ch.* 1 Hoff. 203; *Clay v. Hart*, 7 Dana, 11; *Bogert v. Hertell*, 4 Hill (N. Y.), 492; *Brothers v. Cartwright*, 2 Jones Eq. 113; 1 *Jarman Wills* (4th Am. ed.), 483 *et seq.* and notes; 2 *Story Eq. Jur.* §§ 1212–1214 a; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524.

“all and whole my heritable and movable estate, chattels, and effects, goods and gear, debts and sums of money.” After further description of the movable estate, there follows: “As also all lands, messuages, tenements, and hereditaments presently pertaining to me, or that may pertain or belong to me at the time of my decease, and particularly without prejudice to the foresaid generality, all and whole the lands of Forden, now called Lawers, comprehending,” &c.: “But always with and under the conditions, provisions, and reservations after specified, and in trust always for the * uses, ends, * 3 and purposes after mentioned; viz., declaring, as it is hereby expressly provided, that these presents are granted by me, the said Major-general Archibald Robertson, with full power to my said trustees, so soon after my decease as may be judged expedient, to call for, uplift, and discharge, or convey the principal sums contained in the several heritable bonds before assigned, or such parts thereof as shall then be remaining due, and interest that may be due thereon, and penalties if incurred; and also to call and sue for, receive, discharge, or convey, or in any other manner and way to dispose upon all and every sum or sums of money that may pertain and belong to me, whether vested in any of the public funds of Great Britain, or secured on mortgage in England, or in whatever other way the said sum or sums of money may be vested or secured, and also all other debts and sums of money due and addebted to me by whatever person or persons; and also to sell and dispose of the lands, mills, teinds, woods, fishings, messuages, tenements, and hereditaments, and others hereby generally and particularly disposed to them in trust, and that either by private sale or public voluntary roup, and by wholesale or by parcels, on such conditions and at such prices as they shall think fit, and with power to receive the prices or to take bonds for the payment of the same from the purchasers, with one or more cautioners reputed responsible at the time. And for rendering effectual such sale or sales, I hereby grant full power to my said trustees to grant dispositions, assignations, discharges, and other writings necessary, with all clauses needful to the purchaser or purchasers of the said lands, teinds, mills, woods, fishings,

and others before disposed, and that simply, so as the
* 4 said purchasers shall be no * ways concerned about the
application of the prices thereof, nor be burdened or
affected with any of the provisions herein contained.” The
deed then went on to give the trustees power to admit and
eject tenants, to grant leases, appoint collectors of rents, &c.
“Declaring always, as it is hereby expressly provided and
declared, that my said trustees shall, by their acceptance
hereof, be bound and obliged, after the sale of the said lands,
teinds, and others before disposed, which I recommend to
them to be done as soon as convenient after this trust opens
to them, to satisfy and pay all my just and lawful debts, and
to perform all the legal obligations I may then lie under for
the payment of any sum or sums of money, more particularly
those contained in the contract of marriage of date the 11th
day of December, 1784, entered into betwixt me and Mrs.
Catherine Austin, *alias* Robertson, my spouse, in case she
shall happen to survive me ; and on the sale of the lands,
teinds, and others before disposed, to allow to remain in the
purchaser’s hands a sum of money, the annual rent of which
shall be at least equal to her jointure or annuity, free of all
deductions whatever, or to lend out such sum of money on
heritable security at the sight and to the satisfaction of the
persons at whose instance execution is to pass on the contract
of marriage entered into betwixt her and me of the date
before mentioned ; the rights and securities for said sum of
money to be taken to the said Catherine Austin, *alias* Rob-
ertson, in life-rent, during all the days of her lifetime, in
security to her of the jointure or annuity provided to her in
the contract of marriage before mentioned, and to my said
trustees in fee, for the purposes of the trust as after men-
tioned, and to their assignees. And after payment of my
* 5 just and lawful * debts, as before mentioned, and secur-
ing a sum for payment of my said spouse’s jointure or
annuity in manner before mentioned, and also after payment
of expenses necessarily incurred in the execution of the trust,
I hereby appoint my said trustees to content and pay, or
assign and make over to such person or persons as I may
already have named and appointed, or shall hereafter name

and appoint, such sum or sums of money, or proportion or proportions of the moneys arising from the subjects hereby generally and particularly conveyed and disposed in trust, including the fee of the sum to be life-rented to my said spouse in case she survive me, as I shall judge proper, payable at such terms and under such conditions as I shall judge necessary. And after making payment of these sums, I hereby appoint my said trustees to make up a stated account of their intromissions and payments made in virtue of this trust, and to denude themselves of the trust hereby committed to them, by assigning, making over, or paying the residue of my means and effects hereby disposed to them in trust, including the right of fee of the same, to be life-rented by my said spouse, in case she shall survive me, in so far as the same shall not have been disposed of by me, to and in favour of any person or persons I may think proper to appoint, by writing ; whom failing, to Rachel and Ann Robertsons, my sisters-german, equally betwixt them, share and share alike, or to the survivor of them, and the heirs and assignees of the survivor. And on my said trustees obtaining discharges of the sums I shall think proper to dispoise and bequeath as aforesaid, and on receiving a discharge or discharges from my said sisters or survivor of them, or the heirs or assignees of the survivor, for the residue of the moneys arising from the funds * hereby conveyed in trust, if any residue shall * 6 remain, or from the heirs or representatives of such of my said legatees and residuary legatees as may have survived me, but died either before the sale of my said lands and estate, or before the conveyance or payment is made to them by my said trustees ; I hereby declare that such discharge to my said trustees shall be a full and complete exoneration to them of their whole intromissions had with the whole before-mentioned means and estate, heritable and personal, in virtue of this trust right. And further, as it will require time after this trust opens to my said trustees before they can turn my heritable subjects into cash, and uplift and receive payment of the heritable and movable debts due to me ; therefore, and in case the free annual income of my means and effects shall

not be equal to, or sufficient for, the payment annually of the interest of the sums I may think proper to appoint my trustees to pay to the persons already named or to be named by me, in a writing under my hand as aforesaid, then and in that case I hereby appoint my said trustees in the mean time, until my said heritable subjects are turned into cash, and the heritable and movable debts due to me received, and my legacies paid off, to pay annually, in the first place, the jointure to my said spouse, in case she shall survive me, and any other obligations I may have come under; and thereafter to divide proportionally among my legatees the free annual income and produce of my funds hereby disposed in trust, and that in proportion to the sums bequeathed to each of my legatees, and at such terms and times as my said trustees shall receive such annual proceeds, or so soon thereafter as may be."

* 7 The said Archibald Robertson did also, upon the * 1st of June, 1812, duly make another testamentary instrument, containing the following among other clauses: " Know all men by these presents, that I, Lieutenant-general Archibald Robertson, of Lawers, considering that, by a trust-deed executed by me of my heritable and movable estate and effects, generally and particularly therein described, bearing date the 29th day of November, 1799, to and in favour of, &c. (the trustees named), in trust always for the ends, uses, and purposes therein mentioned; and amongst others, my said trustees are required to turn my means and effects thereby conveyed in trust into money, and to content and pay, or assign and make over, to such person or persons as I shall name and appoint, by a writing under my hand, at any time of my life, and even on death-bed, such sum or sums of money, or proportion or proportions of the moneys arising from the subjects thereby conveyed and disposed in trust to my said trustees: therefore, in terms of my trust-deed, and in the event of a child or children, whether male or female, being procreate of my body of my present or any subsequent marriage, and existing at the time of my death, then and in that case I hereby direct and appoint my said trustees, and the quorum of them, to bestow and employ the profits and prod-

uce of my said trust funds, remaining after the payments of debts and expenses, for the use and behoof of the heirs of my body: declaring, that as soon as my heir shall be married or attain majority, then my said trustees shall be obliged to denude of my whole trust estate and funds in favour of the heirs of my body, but to return to my said trustees, for the uses, ends, and purposes mentioned in the said trust right, in case of the failure of heirs of my body, without otherwise disposing thereof after they shall have attained majority.

But * in the event of my decease without lawful issue of * 8 my body of my present or any subsequent marriage, or in case of the failure of heirs of my body, without otherwise disposing of my trust estate and funds, then and in either of these cases, I hereby direct my said trustees, or quorum of them, to pay the sums of money after mentioned to the persons after named, out of my means and effects disposed and conveyed to them in trust; *videlicet*, to my dearly beloved wife Mrs. Catherine Austin, *alias* Robertson (over and above the jointure already settled by our contract of marriage), I bequeath the sum of 10,000*l.* sterling, to be entirely at her own disposal: I likewise hereby make over to her my right to any money or sums of money that she is or may be entitled to as one of the heirs of her late mother, the Honourable Mrs. Austin: I also hereby grant to her for her lifetime an annuity of 1100*l.* sterling, and likewise the annuity she is entitled to from the widows' fund of the corps of his Majesty's Royal Engineers: I also bequeath to her, for the purpose of a jointure-house, with a stable and coach-house, leaving the house and situation to her own choice, with such bits of furniture as she may incline, the sum of 4000*l.* sterling."

After stating other bequests to his wife, and appointing annuities to different relations, and specific legacies to friends, the testator proceeded thus: "The residue of my means and effects, including the right to the fee of the sums vested and secured for the payment of the said annuities, so far as not otherwise disposed of by me, I hereby direct my said trustees to pay and make over to my two nieces, Archibald Boyd

Robertson and William (Wilhelmina) Boyd Robertson, as my residuary legatees, share and share alike, or to the heirs and assignees of my said nieces who may happen to survive me, but who may die * before my said trustees may finally settle and wind up my trust affairs: declaring also, that the share of such of my residuary legatees as may die before me shall fall to the survivor of them, if not otherwise disposed of by me; which legacies to the persons before named I direct my trustees to pay; and the same shall bear interest from the first term of Whitsunday or Martinmas after my decease, or at the first term of Whitsunday or Martinmas after the failure of heirs of my body, without otherwise disposing of my trust funds as before mentioned, or so soon thereafter, in either case, as my funds conveyed in trust can be converted into money; and the annuities to commence and run from the said term with the interest on the above legacies; but always with and under the provision and declaration as to the payment of interest on the legacies afore mentioned, as is particularly contained in my said trust-deed, before my funds are turned into money. But declaring always, and it is hereby provided and declared, that in case my means and effects disposed in trust shall not, when turned into money, be equal or sufficient for the payment of the sums hereby appointed to be paid, then and in that case, each of the legacies to the persons above named (the legacies to my wife Mrs. Robertson excepted) shall suffer a proportional diminution or abatement, but not the annuities."

On the 12th of February, 1813, the said Archibald Robertson died, without having left any heir of his body, leaving the before recited two testamentary instruments. The two nieces named in the last testamentary paper survived the testator, but one of them, Archibald Boyd Robertson, died in October, 1813.

The special verdict set out the property possessed by the testator at the time of his death, and found, that before * 10 July, 1814, the trustees had paid all the * debts, funeral expenses, and legacies. The special verdict also set forth an account of the estate of the testator to the following effect:—

The personal estate in possession amounted to .	£30,000
A heritable bond, assigned by his trustees to a third party, amounted, with interest, to . . .	20,300
	<hr/> £50,300

The sums to be paid out of this personal estate were composed of the following items: —

Debts and funeral expenses	£12,500
Legacies	20,700
Purchase of a house for his widow	4,000
	<hr/> 37,200
The personal estate, therefore, exceeded the charges on it by the sum of	£13,000
	<hr/>

The landed estate was described in the special verdict as of the value of 52,446*l.*, producing a yearly rental of 2166*l.*

Under these circumstances, the trustees did not think that they were required to sell the estate, because, although there were two annuities, the purchase of which, if bought, would have amounted to 21,175*l.*, yet, as they were made by the will charges on the income from the real estate, the trustees did not take them into the calculation they made as to the liabilities and assets of the personal estate. Miss William Boyd Robertson, the surviving niece of the testator, preferred taking the estate to having it sold; and the trustees, believing themselves to be invested by the words of the will with a discretionary power as to its sale, conveyed, by deed of the 25th July, 1814, the estate of Lawers to her in fee; she at the same time * granting them a lawful and sufficient * 11 indemnity for so doing, binding herself to pay the annuities charged on the real estate; and thereupon she entered into possession of it. The Court below considered that the will did not give the trustees a discretion as to the sale of the estate, but required it absolutely to be sold; and so considering the will, treated the whole property as subject to legacy duty, which, by the decree, was ordered to be calculated on the whole, as originally bequeathed by the testator to his two

nieces. (a) The writ of error was brought against this judgment of the Court below.

Mr. Simpkinson and Mr. Strathern Gordon, for the plaintiffs in error. — The legacy duty has been improperly charged here; the plaintiff in error is not at all liable to the payment of it. The case depends on a question common in the Courts of this country, whether the will directs a conversion of the real property out and out into personalty, or whether the trustees have a mere power to sell with a discretion to use or not to use that power. The construction put on the will in the Court below is erroneous, and the plaintiff's supposed liability to the duty is founded on that erroneous construction. It is assumed, that by the will the whole of the estate of the testator was to be converted into personalty; but that is not so. There is not any express command from the testator to his trustees to sell the estate. There is a power given them to sell, but the creation of a power does not necessarily imply a direction to exercise that power. The

power was created in order to provide against a possible contingency: if the contingency should not arise, the power was not required to be exercised. Throughout the two testamentary papers, but especially in the first, the testator has been careful to provide against every contingency; and to that carefulness, and not to any positive desire that the estate should be sold, is to be attributed the power of sale which he has vested in the trustees. The trustees were under certain circumstances to sell the estate, if in their discretion they should think a sale necessary. They did not find it to be necessary, for the assets of the personal estate enabled them to pay all the debts and legacies. That being so, they were bound not to exercise the power of sale; for the clause which relates to the heir of the body of the testator shows that the testator contemplated an event which is totally incompatible with a supposition of

(a) It was admitted that, so far as the decree against the present appellant ordered the legacy duty to be calculated on the whole amount of the property bequeathed, it was in form erroneous, and must be varied. That point was, therefore, not argued.

his intention that there should absolutely be a sale. The testator directs his trustees to “bestow and employ the profits and produce of my said trust funds remaining after payment of debts and expenses, for the use and behoof of the heirs of my body: declaring, that as soon as my heir shall be married or attain majority, then my said trustees shall be obliged to denude of my whole trust estate and funds in favour of the heirs of my body; but to return to my trustees, for the uses, ends, and purposes of the said trust, in case of the failure of heirs of my body, without otherwise disposing thereof after they shall have attained majority.” This part of the will shows most distinctly that the testator contemplated the coexistence of personalty and of landed estate, and provided for the latter being conveyed to the heir of his body by the trustees. If he had an heir, he would naturally desire that that heir should succeed to his estate, and therefore he made this provision: but he went further; for, contemplating the possibility of such heir dying, and the heirs of his body failing, he desired that the * estate * 13 should return to his trustees. That would have been impossible with mere personalty, and shows most unequivocally that the testator then thought that he was dealing with real estate, which might revert in the manner there spoken of. But it would have been absurd to make such provision, had the will amounted to a positive direction to the trustees, in the first instance, to sell the estate. This indication of the testator’s purpose is a complete answer to any argument as to an implied direction or command to sell the estate: and no such direction is expressed. The will, therefore, must be taken to have created the power for a particular purpose, and to have vested in the trustees a discretion as to the exercise of that power. •

If that argument is well founded, then it is clear upon the authorities that legacy duty is not payable in respect of this estate of Lawers. The case chiefly relied on for the Crown is that of *The Attorney-General v. Holford*; (a) but there the direction was so clear and express, that though the estate

(a) 1 Price, 422.

was not in fact sold, the Court held that the case must be treated in the same way as if the direction had actually been carried into effect. In the case of *The Advocate-General v. The Trustees of Ramsay's Estate*, (a) which occurred in the Court of Exchequer in Scotland, and is printed in a note to the report of *In re Evans*, (b) the direction to sell was also express, and had been carried into effect. But in the case of *In re Evans*, the testator had devised real estates to trustees for the benefit of several persons for their lives, and the trustees were to sell the same, or such part thereof "as shall appear most expedient to any trustee or trustees for the time being, towards the management of my property and affairs."

Some portion of the estate had been sold shortly after * 14 the testator's * death, because, being suitable for building, it was advantageous to the estate to sell it; and the remainder, after being subject to the trusts for ten years (as this estate might have been under the denuding clause before referred to), was sold, under an order of the Court of Equity in a cause. The Court there held, that the money arising from either sale was not liable to legacy duty. That case is exactly in point with the present. There was no sale here, because the trustees did not think it necessary for the trusts; there was a sale there, because the trustees deemed it advantageous to the management of the property: but there, as here, a discretion was vested in the trustees; and on that, and not on the mere fact of the sale, ought the decision to proceed. The will in fact was, as to Lawers, a devise of real and not a bequest of personal estate, and consequently no legacy duty was payable.

The Scotch cases lead to the same conclusion, and establish the principle, that where the heritage is not absolutely directed to be sold, but there is a mere direction to sell for the purposes of the trust, the property shall be treated as real and not as personal property. *Durie v. Coutts*, (c) *Cathcart v. Cathcart*, (d) and *Murray v. The Earl of Rothes*. (e) In the first of these cases, the whole of the testator's property,

(a) 2 Cr. M. & R. 224, n.

(b) 2 Cr. M. & R. 206.

(c) Morr. 4624-5595.

(d) 8 Shaw & D. 803.

(e) 14 Shaw & D. 1049.

heritable and movable, was vested in trustees to be sold, "if they thought fit," for the purposes of the trust. In *Cathcart v. Cathcart* there was a similar power, but no direction; and there was, as in this case, a provision, after satisfying the debts and legacies, for the trustees to dispoise, assign, and pay over the residue to the heirs of the testator. And in *Murray v. The Earl of Rothes*, a heritable bond, which * might have been but was not sold under a * 15 power, was treated as heritage, and held to descend accordingly. On all these authorities, Scotch as well as English, it is clear that this judgment is bad, and must be reversed.

Mr. Twiss and *Mr. Romilly* appeared for the Crown, but were not called on.

LORD BROUGHAM. — My Lords, in this case I entertain no doubt whatever, and therefore I should suggest to your Lordships that the proper course will be at once to give judgment for the Crown. The question in this case arises upon the event which has happened, of General Robertson leaving no heirs of his body. Their Lordships in the Court below considered that, had he left heirs, the question could not have arisen: but we are relieved from all difficulty on that point by the fact that he did not leave heirs. He intended, probably, that if he left heirs there should not be a sale of his estate, except of such part as might be necessary to pay his debts, which would have been more than satisfied by the heritable bond and by the personalty, so that the great estate of Lawers should not be brought to sale in that event, but the trustees should denude themselves in favour of the heir; but if there should be no heir of the body, then I think that in that case he intended that there should at all events be a sale. The whole question depends upon this, whether or not the will, or the two instruments in the nature of a will, taken together, amount to a direction to sell? If the language used by the testator amounts to a direction to sell the estate at his death, and that death takes place without his leaving heirs of his body, then the estate must be considered as money, and is

to be dealt with as money, and the liability to legacy
 * 16 duty attaches. I think * that in every respect it was money. In respect of the succession, it would go, not to the heir, but to the next of kin. If so, it was money in respect of revenue, and was liable to the payment of the duty; and nothing that took place after that could alter the rights of the Crown. The state of the property, whether land or money, at the time of the death of the testator, is the only question; and by that state at that time must be determined, both the rights of private parties — with which we have nothing to do, except by way of argument and illustration — and the right of the Crown, with which alone we have now any concern. My Lords, I think that, taking the whole of these instruments together, I can entertain no doubt whatever that the intention of the testator was, and that he contemplated nothing else than that, in the event of his death without leaving an heir of his body, the land should be brought to sale.

Then I come to consider the words of the will when treating of the property as residue. The testator says, “let the whole of my means and effects,” in which he includes the produce from the sale of the land which he has appointed to take place, “be divided between my two nieces, Mrs. Archibald Boyd Robertson and Miss William Boyd Robertson, share and share alike, as residuary legatees.” I think that direction is important: it leaves very little doubt in my mind of what the testator assumed to be the case, and what he intended. I rely, therefore, on this direction, not merely on account of the words “residuary legatees,” although that expression clearly applies much more to persons to whom a pecuniary residue is bequeathed, than to persons to whom an estate of inheritance is devised. I admit that the word
 “legatee” is sometimes used for “devisee,” as the ex-
 * 17 pression “devise” is sometimes employed, * though inaccurately, for “legacy.” But it is the general mode of dealing with the property that I look to. In the sentence I have quoted it is plainly dealt with as residue of the personality.

I come then, lastly, to consider the way in which the tes-

tator has dealt with the property, and as it were explained his own previous intentions in the recital to the second deed. The recital in that deed expressly uses the word "required." He says, "whereas, amongst others, my trustees are *required* to turn my means and effects thereby conveyed in trust into money." It is a very good mode of construing an instrument, to take a man's own words when the meaning appears doubtful (which, however, I am in this case disposed to deny); I think it is a good mode of getting at his meaning, to see what he himself thought he had done. Adopting this course, we find from his own expressions that he thought he had not merely conferred a power of sale, but had given an order to sell; for the word "required" is a stronger word than directed; it is, indeed, the strongest word that he could have used.

My Lords, these are the points on which it appears to me that the Court below has come to a right conclusion; and I am, therefore, of opinion that your Lordships ought, without hearing the counsel for the defendant in error, to affirm the decree, and to give judgment for the Crown. I will only say one word upon the cases which have been cited. *In re Evans* is completely distinguishable from the present. In that case the expression used was, "sell such part of the estate as may be wanted for the purpose of paying the debts," and then deal so and so with the residue. Here the direction is, "sell the whole whether it may be wanted or not, and deal with the residue in a manner * totally differ- * 18
ent from that of dealing with the estate; give it not to the heir-at-law, but to the next of kin." In that case it was not an estate of personalty at all with which the trustees had to deal, it was a charge upon the realty; here it is an estate of personalty.

Then, as to the case which has been cited of *Durie v. Coutts*, (a) the words there are, "if he shall think fit;" words giving the trustee a discretion whether he will sell or not; there are no such words here. The author of that deed would never have said, "whereas I have *required* my trustees

(a) Morr. 4624.

to sell ;” he would have said, “ whereas I have empowered my trustees to sell ;” it was a mere power to sell, and nothing else. Then comes the case of *Cathcart v. Cathcart*, (a) which was a totally different case, for there the person to whom the estate was made over was the heir-at-law.

My Lords, I am therefore clearly of opinion that in this case we have nothing to do but to give judgment for the defendant in error, with the variation which it is now admitted must be made in the amount of the duty payable.

LORD COTTENHAM. — My Lords, I am entirely of the same opinion. It was alleged by the learned counsel for the appellant that this case turned upon that which was a common question in the Courts of this country ; whether this amounted to a conversion of the real property out and out into personalty, or whether it was to be considered as a discretion to sell for the purpose of paying off certain charges, debts, and so on ? That is the criterion by which ques-
 * 19 tions of this sort are to be determined. The * decision turns upon the opinion formed (varying, of course, in the different cases according to the expressions used) upon the question, whether it falls under one denomination or another ? Looking at these instruments, it does not appear to me that they admit of a doubt. It is not necessary that the words of the power should contain an absolute direction to the trustees to sell. The intention of the testator must be gathered from all the provisions of the deed, and I cannot find any provisions in that deed which raise any question as to the intention of the author of the instrument, or which indicate any desire that the estate should be sold only in the event of ultimate failure of heirs of his body. In that power, he says that it shall be executed as soon as convenient ; and then he proceeds to give the surplus of the property, which he describes in terms that show him to have considered that he was dealing with the money the produce of the sale of the lands in specie, and he provides in terms which are very sig-

(a) 8 Shaw & D. 803.

nificant for the interim management of the property. Taking all these expressions together, I apprehend that no doubt can be raised upon the terms of the first deed.

That brings us to the consideration of the second deed. In that he puts a construction on what he has done in the first; he says that he had required the trustees to turn the estates into money. If this had been a case in an English Court of Equity, and the question had been whether it was a power of conversion of the estate out and out, there is no case within my recollection that would throw a doubt upon that subject. And cases have occurred in Scotland, which show that the rule of decision there has been founded upon the same principle as in this country; and, therefore, that the law is the same in both. It appears to me, my Lords, * that * 20 the two instruments, taken together, give a direction to sell and convert the estate from land into money; and therefore the gift which is the subject of the present appeal is, for the purpose of the legacy duty, to be considered as a gift of money, and not as a gift of land.

LORD CAMPBELL. — My Lords, it is quite sufficient for me to say, that looking at these deeds, I am thoroughly convinced that General Robertson intended that if he died without leaving a son, the estate of Lawers should be sold. He did die without leaving a son, and no discretion was then vested in the trustees under these deeds; they were bound to sell, and therefore this estate is to be considered liable to the duty. This case is entirely distinguishable from those which have been cited, where the trustees were merely invested with a power which, in their discretion, they might or not think fit to exercise; and where, therefore, there was merely a charge on the real estate, not a positive direction to convert that estate into personalty. My Lords, I have had the great advantage of reading the able and luminous judgments of Lord JEFFREY and Lord CUNINGHAME; they seem to me to have reasoned the case with great ability and in the most satisfactory manner, and I entirely concur with the views which they took of the provisions to be found in these two instruments.

Mr. Twiss asked for costs to be given to the Crown.

LORD BROUGHAM. — The whole of the judgment of the Court below cannot be sustained. It is so far wrong as it gives the duty payable on the whole estate.

* 21 * *Mr. Twiss* said that the sum in the verdict had been arranged between the parties. The full sum had been inserted by mistake.

LORD BROUGHAM. — But it is expressly stated in the judgment, to which alone this House can look. The expense of the hearing might, perhaps, have been saved, had there been a consent beforehand to certify the error.

[It was ordered and adjudged, that the judgment of the Court below be affirmed, but with this variation, that her Majesty may have execution against the said William Boyd Robertson Williamson for the sum of 1249*l.* 2*s.* 0½*d.*, being the amount of duty payable by the said W. B. R. Williamson, by consent of parties, instead of for the sum of 2500*l.* in the said judgment mentioned: and that the record be remitted, to the end that such proceedings may be had thereupon as to law and justice shall appertain.]

* WOODMASON v. DOYNE.

* 22

1843.

MATHIAS WOODMASON (son of James Wood- } *Appellant.*
 mason, deceased)
 PHILIP DOYNE *Respondent.*

Practice.

A cause had been heard in the Court of Chancery in Ireland, and a decree made ; the cause was reheard, and the decree affirmed. The party who had failed in the suit petitioned for a second rehearing, and undertook not to appeal from the decision of the Lord Chancellor on such rehearing, but to abide by it. The Lord Chancellor affirmed the original decree, and in the last decree set forth the undertaking in consequence of which he had reheard the cause. The party who had given the undertaking brought an appeal. The Lords, in their discretion, refused to hear it.

April 4, 1843.

WHEN this case was called on, the *Solicitor-General* and *Mr. Loftus Wigram* appeared at the bar on the part of the appellant ; but before they addressed the House,

Mr. Pemberton took a preliminary objection. — This is an appeal against a decree of the Lord Chancellor of Ireland, made on the 30th of April, 1830. There had been a decree made in this cause by Lord MANNERS on the 28th of June, 1815, which directed certain accounts to be taken before the Master, and also directed in what way the Master should proceed in taking them. The appellant, thinking himself aggrieved by that decree, presented a petition to Lord MANNERS praying for a rehearing, and the petition was granted ; the cause was reheard in 1826, and the decree affirmed. In 1829, when Sir ANTHONY HART had become Lord Chancellor of Ireland, the appellant presented a petition for a second rehearing. By the practice of the Court of Chancery in Ire-

land, there cannot be more than one rehearing. The
 * 23 appellant, * who was the person petitioning for a rehear-
 ing, consented, in order to get his petition granted, to
 undertake not to appeal against the decree which might be
 made by the Lord Chancellor. The cause was, on this con-
 sent, reheard, and the original decree was affirmed. He now,
 in violation of the undertaking, brought this appeal.

LORD CAMPBELL.—Is the undertaking stated in the decree?
 In *Morris v. Davies* (a) it was not, and that was the reason
 which induced the House to hear the appeal.

Mr. Pemberton.—In this case the undertaking does appear
 on the face of the decree, which recites the decree of 1815,
 and the other proceedings. It is in these terms:—

“And whereas the said defendant James Woodmason, on
 or about the 6th day of August, 1829, presented his petition
 to the Right Honourable the Lord Chancellor of Ireland, set-
 ting forth the several matters herein and in his said former
 petition set forth, and further setting forth that this cause
 was reheard before the Right Honourable Lord MANNERS in
 relation to the matters aforesaid, on the 5th day of July, 1826,
 but that his Lordship had declined to vary his former decree:
 and the said defendant James Woodmason, by his said second
 petition, prayed that this cause might be reheard in relation
 to the allocation and disappropriation of said private and
 separate properties, and that same might be decreed to be
 applied according to the trusts declared in respect of same, in
 and by the said deeds of the 31st day of December, 1807, in
 the pleadings mentioned: and whereas the said defendant

James Woodmason, having by his counsel in open Court
 * 24 * undertaken not to appeal from the decision of the said
 Lord High Chancellor of Ireland, but to abide by his
 decision on such rehearing; whereupon and on debate of the
 matter, and inasmuch as the Attorney-General and another
 moved the matter of said petition, and same having been

(a) *Ante*, Vol. V., pp. 163–224.

opposed by *Mr. Serjeant Blackburne*, of counsel with the petitioners ; it was by an order made in this cause, bearing date the said 6th day of August, 1829, ordered by his Lordship that this cause should be set down to be reheard touching the matters complained of ; and this cause having been set down to be reheard, the same came accordingly on to be reheard on Thursday, the 26th day of November, 1829, and to be further reheard on the 27th and 30th days of said month of November, on the 1st and 2d days of December, in said year 1829, and also on this day, in presence of counsel learned in the law, as well on behalf of the plaintiffs as of the said defendant James Woodmason, no counsel appearing for the other defendants, or any of them : on reading the said several decretal orders so, as aforesaid, pronounced on the 28th day of June, 1815, the 5th day of July, 1825, the said order for rehearing of the 6th day of August, 1829, the several proofs and evidences in the cause, the answer of said defendant James Woodmason, and upon full debate of the matter, and due consideration had of what was offered, it is this day, that is to say, Friday, the 30th day of April, 1830, ordered, adjudged, and decreed by the Right Honourable the Lord High Chancellor of Ireland, that the decretal order pronounced in this cause on the 28th day of June, 1815, be, and the same is hereby, affirmed, with costs of the rehearing."

[THE LORD CHANCELLOR. — Is the appeal against that decree alone ?]

It is so.

* *The Solicitor-General* was then called on to answer * 25 this objection. — There is no doubt that the appellant entered into this undertaking ; but the question for the House is, whether such an undertaking is binding on the parties ? Both the parties did not enter into this undertaking, and consequently both are not bound by it ; so that the other party might have appealed had Lord Chancellor HART's decision

been against him. This in itself is a sufficient answer to the objection.

THE LORD CHANCELLOR. — It may be true that this was an undertaking of only one of these parties, and would not have been binding on the other; but what are the circumstances under which it was made? There had been a decree against this party; the cause had been reheard, and that decree had been affirmed. This party wished the cause again to be reheard, and he petitioned the Lord Chancellor for that purpose. This petition might have been refused; in the ordinary course of things it would have been refused; but the Lord Chancellor said: "If you will agree not to make my decision on this second rehearing the subject of an appeal, I will rehear the case." And the party petitioning him having given an undertaking to that effect, the Lord Chancellor did rehear it. This amounted to saying to the party: "To what Court do you wish to appeal? to the House of Lords, or to this Court, where you may have justice done in a much more rapid manner than by waiting for the hearing of an appeal in the House of Lords?" The party prayed to be heard in that Court; on this undertaking he was heard there; after that he cannot appeal to this House.

LORD CAMPBELL. — The bargain was fair and reasonable. * 26 There is no doubt about the effect of the undertaking itself. It was considered in *Morris v. Davies* that if the undertaking had appeared on the face of the decree, it would have been binding there.

Mr. Pemberton. — This is often done in cases at the Rolls.

The Solicitor-General. — But in those cases both parties enter into an agreement. There is no mutuality here; and the only ground on which this objection can be put is, that the undertaking is like an undertaking to refer a case to the Lord Chancellor, and be bound by his decision; which would make it resemble an award.

Mr. Loftus Wigram, on the same side. — The permission to have the case reheard was a question for the discretion of the Lord Chancellor of Ireland. In his discretion, and upon this undertaking being given, he reheard the case. Under such circumstances the undertaking cannot affect the power of this House, cannot deprive this House of the right to hear the appeal. The matter was brought before the appeal committee, and the members of that committee thought that the objection would not prevent the appeal from being reheard.

THE LORD CHANCELLOR. — This case is not like the case of an award. The party here was asking for a favour. Terms were proposed on which that favour might be granted: he accepted those terms, and had the advantage he sought. It would be hard on the other party, after what has taken place, to allow this appeal to be heard; for the case would not have been reheard in the Court below but for this undertaking, * and the Lord Chancellor of Ireland must have * 27 assumed that this was not a fit case for rehearing if it was afterwards to be made the subject of appeal. He consented to rehear it in order to prevent the appeal. As to what was said in the appeal committee, it is clear that the appeal committee would treat this as a matter on which the discretion of the House ought to be exercised. The undertaking does not constitute an objection in point of law to the House hearing the appeal; but it furnishes matter which, in the discretion of the House, ought to prevent the appeal from being heard.

LORD CAMPBELL. — The appeal committee would not, of course, stop the appeal from coming before the House; for the objection is matter on which the House ought to exercise its discretion. It seems to me that this is a fair and reasonable undertaking, and ought to be enforced by the House refusing to hear the appeal.

THE LORD CHANCELLOR. — The appeal will be dismissed, but not with costs, as this is a pauper case; though one noble

Lord now present thinks that the party ought to be punished in costs for bringing the appeal in direct violation of his undertaking.

Appeal dismissed.

1843.

REES PRICE *Plaintiff in Error.*

ROBERT BENTON SEELEY and six Others *Defendants in Error.*

Trespass. Breach of the Peace. Arrest. Justification.

A private person is not justified in arresting, or giving in charge of a policeman; without a warrant, a party who has been engaged in an affray, unless the affray is still continuing, or there is reasonable ground for apprehending that he intends to renew it.¹

A plea, justifying an arrest for an affray without warrant, ought to contain a direct averment that there was an affray or a breach of the peace continuing at the time of the arrest, or a well-founded apprehension of its renewal.

A plea of justification to an action of trespass for assault and false imprisonment, — after stating that defendants were in lawful possession of a yard, and were there erecting a wall by their servants; that plaintiff entered the yard and upon the wall, and made a great noise, disturbance, and affray, ill-treated defendants, threw down their servants so employed, and obstructed the erection of the wall, in breach of the peace; then averring a requisition by defendants to plaintiff to depart, and his refusal and continuance; whereupon defendants and their servants gently removed him, and he violently resisted, and assaulted one of the defendants in so doing, — proceeded thus: that plaintiff then and immediately afterwards, and just before the said time when, &c., with force, &c., again broke and entered the yard and got upon the wall, and again made a great noise, disturbance, and

¹ See 1 Chitty Cr. Law, 18; Addison Torts, 405; Baynes v. Brewster, 2 Q. B. 385; Commonwealth v. Carey, 12 Cush. 246; Phillips v. Trull, 11 John. 486; Knot v. Gay, 1 Root, 66.

affray therein, and threatened to assault, insulted, and ill-treated and showed fight to defendants, and then again forcibly obstructed the further erection of the said wall, and threw down part thereof, &c., in breach of the peace ; whereupon defendants, having view of the offences and misconduct of plaintiff last aforesaid, in order to prevent such breach of the peace, &c., then and there gave charge of the plaintiff to a police constable, who then saw the misconduct of plaintiff, to take him before a justice ; and the policeman took him before a justice.

Held, that these were sufficiently positive averments of a continuing breach of the peace from the commencement until the plaintiff was given in charge, or amounted to a necessary implication of a well-founded apprehension that it would be renewed.

Practice.

The Standing Order, No. 58, directing " that no person shall sign an appeal to this House unless he was of counsel in the same cause in the Courts below, or shall attend as counsel at the hearing at the bar of this House," is not to be departed from, although there may be cases in which exceptions will be allowed.

May 11, 1843.

THIS was a writ of error on a judgment of the Exchequer Chamber, which affirmed a judgment of * the * 29 Court of Queen's Bench, under the following circumstances : —

In Easter term, 1839, the plaintiff in error brought an action against the defendants in error, in the Court of Queen's Bench : the declaration contained two counts, the first stating an assault, battery, and false imprisonment of the plaintiff by the defendants ; and the second stating an assault and battery.

The defendants severed in their pleas : the said R. B. Seeley and five other defendants, pleaded, —

1st. Not guilty to the whole declaration.

2dly. As to the second count, a justification (on which no question arose).

3dly. As to the first count also, a justification, stating that four of them, with other persons, being trustees under an Act of 10 Geo. 4, for taking down and rebuilding St. Dunstan's church, were, as such trustees, lawfully possessed of a certain close or yard, with the appurtenances, situate and adjoining

to Clifford's Inn, in the city of London, in which close certain persons, with the authority of the said trustees, were, before and at the said times when, &c., constructing a wall, by Thomas Winney and Thomas Lee, their servants in that behalf; and the said trustees being so possessed, and the said servants being so employed, the plaintiff, just before any of the said times when, &c., in the said first count mentioned, came into the said close or yard, and upon the said wall so constructing as aforesaid, "and then and there with force and arms made a great noise, disturbance, and affray therein and thereon, and insulted, threatened, abused, and ill-treated the said last mentioned defendants so being such trustees as

aforesaid, and also the said George Colk, one of these
* 30 defendants, in the said * close or yard respectively; and then with force and arms assaulted and pushed about and threw down the said T. Winney and T. Lee, being such servants employed in constructing the said wall as aforesaid, and then greatly disturbed and disquieted the said trustees in the peaceable and quiet possession of the said respective close or yard, and forcibly hindered and obstructed the erection of the said wall there, in breach of the peace of our lady the Queen; whereupon the last mentioned defendants, R. B. Seeley, &c., being such trustees as aforesaid, requested the said plaintiff to cease his said noise, violence, hindrance, and disturbance, and to depart from and out of the said close or yard and wall respectively; which the plaintiff then wholly refused to do, and continued his said noise, violence, hindrance, and disturbance. The last mentioned defendants, so being such trustees as aforesaid, then and just before the said times when, &c., in defence of the possession of their said close or yard and wall, and the said George Colk, Cyrus Elliman, and Thomas Eaves, as their servants in that behalf and by their command, and the defendants did gently lay their hands on the plaintiff, in order to remove, and did then remove, the plaintiff from and out of the said close or yard of the said trustees, and off the said wall, as they lawfully might for the cause aforesaid; the plaintiff with force and arms violently resisted the said removal, and assaulted, beat, and ill-treated the said T. Eaves in so doing, in further breach of

the Queen's peace : and the said defendants further say, that the plaintiff then immediately afterwards, and just before the said times when, &c., with force and arms, &c., again broke and entered the said close or yard, and got upon and over the said * wall, and again made a great noise, dis- * 31 turbance, and affray therein and thereon, and threatened to assault, and insulted and abused and ill-treated, and showed fight to the defendants, being such trustees as aforesaid, and the said servants in the said close or yard ; and then again forcibly obstructed and hindered the further construction of the said wall thereon, and forcibly kicked and threw down a part of the same already built, and greatly disturbed and disquieted the said trustees in the peaceable and quiet possession of the said close or yard, in breach of the peace of our lady the Queen ; whereupon the last mentioned defendants, being such trustees as aforesaid, and having view of the said offences and misconduct of the plaintiff last aforesaid, and the said G. Colk standing by and also having such view as aforesaid, in order to preserve the peace, and to restore order and tranquillity, and to prevent such breach of the peace in the said close or yard respectively, and to proceed peaceably, quietly, and undisturbedly in the construction of the said wall, then and there gave charge of the plaintiff to the said T. Eaves, then being a police constable of and for the city of London, who then saw and had view of the said misconduct and breach of the peace committed by the plaintiff as last aforesaid, and then requested the said policeman to take the plaintiff into his custody and carry him before some justice or justices of our lady the Queen, assigned to keep the peace in and for the said city of London, to answer the premises and to be dealt with according to law ; and the said policeman, being such constable as aforesaid, at such request of the last mentioned defendants, and the said Cyrus Elliman, in his aid and assistance and by his command, then and there gently laid hands on the plaintiff for the * cause and * 32 purpose aforesaid, and did then and there take the plaintiff into custody and conduct him from and out of the said close or yard, in order to carry and convey him before such justice as aforesaid." The plea then proceeded to allege

that the trespasses were committed in so doing and in overcoming plaintiff's resistance to the constable; with an averment that as little damage was done to plaintiff and his clothes as might be, and that the trespasses all took place in the city of London.

The defendant Eaves, a London policeman, pleaded, — 1st. Not guilty by statute.

2d and 3d. Justifications, on which no question is raised in this writ of error.

The plaintiff joined issue on all the pleas of not guilty, and replied *de injuria*, &c., to the special pleas; whereupon issue was joined.

The cause was tried before Lord DENMAN at the London sittings after Michaelmas term, 1839, when the jury found for the plaintiff on the general issue, with one shilling damages; and for the defendants on the pleas of justification. A motion to arrest the judgment was afterwards made, but the Court directed the judgment to be entered for the defendants. The plaintiff brought his writ of error in the Court of Exchequer Chamber, where the judgment of the Court of Queen's Bench was affirmed. (a) The plaintiff then brought the present writ of error in this House.

Mr. Fitzroy Kelly and *Mr. Fry*, for the plaintiff in error. —

It appears from the evidence that at the time the trespasses complained of in the declaration were committed, the plaintiff was only protecting the adjoining premises of his daughter against the encroachments on them by the defendants, in the building of their wall. The question, however, for the consideration of the House does not arise on the merits, but on the pleadings. The plea of justification to the first count of the declaration is insufficient in law to bar the plaintiff's right of action for the trespasses alleged in that count. Those trespasses are admitted by the plea; and the matters alleged by way of justification are, on the face of the averments, not sufficient to justify them. It is averred that Eaves endeavoured to apprehend, without

(a) 10 L. J. N. S. Exch. 543.

averring that he had a warrant or other authority for that purpose, or that there was any sufficient reason for his interference. The altercation and disturbance between the plaintiff and the defendants had ceased when the former was given in charge to Eaves. The law on this point is clearly laid down in a well-considered judgment by Mr. Baron PARKE, in the case of *Timothy v. Simpson*. (a) That, like the present, was an action of trespass for an assault and false imprisonment, to which there was a special plea that the defendant was possessed of a dwelling-house, and that the plaintiff entered the house and made a great disturbance and affray therein, &c., whereupon the defendant requested the plaintiff to cease his disturbance and to depart, which the plaintiff refused to do, and continued in the house making the said disturbance and affray, whereupon the defendant, in order to preserve the peace, gave charge of the plaintiff to a policeman, who took the plaintiff into custody. Mr. Baron PARKE considered that plea to be bad in law, and he laid * down the law in these terms: “It is * 34 unquestionable that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it, and may arrest the affrayers and detain them till the heat be over, and then deliver them to a constable, who may carry them before a justice of the peace.” It appears from this clear statement of the law on the point, that it is a material circumstance whether a breach of the peace is committed in the presence of the party giving charge of the affrayer, or whether the affray which he witnessed ceased and it is likely to be renewed; for any person may apprehend the breaker of the peace during the affray, and also after it ceased if there is reasonable ground to fear it will be renewed. But where there is no continuing affray, and no reasonable ground to apprehend its renewal, no person is justified in arresting a party.

[LORD CAMPBELL. — Your general law will not, I suppose, be controverted on the other side. One private person has

(a) 1 Cr., M. & R. 757.

no right to give another in charge after the disturbance has ceased.]

It will not be necessary, therefore, to trouble the House with more cases on that point, except only by a reference to the case of *Cook v. Nethercote*, (a) at the trial of which Mr. Baron ALDERSON charged the jury to this effect: that to justify a constable in apprehending a party for an affray, without a warrant, it is necessary that the constable should have had view of the affray while the party was engaged in it, and that it was still continuing at the time of his apprehension. If the "affray was over, then the constable had

not and ought not to have the power of apprehending
* 35 the persons * engaged in it; for the power is given him by law to prevent a breach of the peace, and where a breach of the peace had been committed and was over, the constable must proceed in the same way as any other person; namely, by obtaining a warrant from a magistrate." (b) The law being, as clearly laid down in those cases, that a private person has no right to apprehend unless the affray is continuing or there is reasonable apprehension of its renewal, the defendants, who admit by their plea that they apprehended the plaintiff and took him before a magistrate, are bound to allege distinctly the facts required by law for their justification. The justification of a continuing or renewed breach of the peace must be positively stated, not alleged by way of inference or reasoning. This plea does not distinctly state that there was a continuing affray, and is therefore insufficient in form.

[LORD CAMPBELL. — There is a direct averment of a breach of the peace: "Whereupon the defendants, having view of the misconduct of the plaintiff, in order to preserve the peace and restore order and tranquillity, and to prevent such breach of the peace," gave charge of the plaintiff.]

"Whereupon" is not a term showing that a breach of the

(a) 6 C. & P. 741.

(b) 6 C. & P. 744.

peace was continuing at the time the plaintiff was taken into custody.

[LORD COTTENHAM. — The words “whereupon,” &c., imply that a breach of the peace was continuing.]

The words do not necessarily imply a continuing state of things amounting to a breach of the peace. “Whereupon” is an equivocal word, has no fixed definite legal meaning, and is not precise enough in *pleading. A coro- * 36 ner’s inquisition has been quashed in consequence of the word “instantly,” used in it, not being definite enough to signify “then and there.” So “whereupon” is insufficient, as not having acquired a definite legal meaning. There are instances of arrest of judgment, where the language of the plea was loose and indefinite. *Sweetapple v. Jesse*, (a) *Jackson v. Pasked*. (b)

The Attorney-General, Mr. W. H. Watson, and Mr. Peacock appeared for the defendants in error.

LORD COTTENHAM. — It does not appear to us, Mr. Attorney, that we should call upon the defendants in error in this case. The law, as stated by *Mr. Kelly* from the judgment of Mr. Baron PARKE, in the case of *Timothy v. Simpson*, is perfectly correct. The question is, whether this third plea comes within the rule of law there laid down? That plea states the forcible expulsion of the plaintiff from this ground, and then proceeds to allege that he “with force and arms violently resisted the said removal, and assaulted, &c., the said T. Eaves in so doing, in further breach of the Queen’s peace: and the said defendants further say that the plaintiff then immediately afterwards, and just before the said times when, &c., again broke and entered the said close, &c., and again made a great noise and affray therein, and threatened to assault, and insulted, &c., and showed fight to the defendants, &c., and then again forcibly obstructed and

(a) 5 B. & Ad. 27.

(b) 1 M. & Sel. 284.

hindered the further erection of the said wall, and forcibly kicked and threw down a part of the same already built, and greatly disturbed the said trustees, &c., in breach of
 * 37 the peace of our lady the Queen ; whereupon the * last mentioned defendants, being such trustees as aforesaid, and having view of the said offences and misconduct of the plaintiff aforesaid, and the said Colk standing by and also having such view as aforesaid, in order to preserve the peace and to restore order and tranquillity, and to prevent such breach of the peace and to proceed quietly and undisturbedly in the construction of the said wall, then and there gave charge of the said plaintiff.”

Now that appears to me to be going a great deal further than it need have gone, according to Mr. Baron PARKE’s judgment ; for this is all one continued act. The party who makes this invasion of the premises, where the wall was being constructed, did not evidently desist from that breach of the peace in which it is admitted he was engaged. But being forcibly expelled from the premises, he again comes on them, again does that which the word “affray” is used to represent, threatens to renew the assault, and proceeds again with the work he had been originally engaged in when he was removed ; namely, destroying the wall partly erected ; all which acts are in the plea distinctly alleged to be against the peace of the Queen. Then the act which is the subject of the charge is stated : “whereupon, in order to preserve the peace, and to restore order and tranquillity,” &c. The argument is, that the word “whereupon,” coupled as it is with the subsequent statement, must be, or may be, intended to mean that the affray and breach of the peace had entirely ceased, and that after it had ceased the party was given in charge to the constable,—a course of proceeding which a private individual is not entitled to adopt. But the allegation is, after narrating the facts amounting to a continued breach of the peace, that “whereupon,” &c., to pre-
 * 38 vent the continuance of * the disturbance, the party was given in charge. Now, I apprehend that the statement there would amount to the allegation of a continued breach of the peace from the very commencement up to the moment

when the party was given into custody. It amounts to that which is deemed sufficient, if the party at the time the arrest took place had ground to believe that a breach of the peace was either continuing or likely to be renewed. Here is a party who comes on the premises, commits a serious breach of the peace, is forcibly driven out, immediately re-enters, and continues the same description of conduct for which he had been previously removed. If language can express acts calculated to raise impressions that a breach of the peace was either to be continued or repeated, it does appear to me that those words amply amount to such an allegation ; and, under the authority referred to, that would be sufficient to justify the arrest which took place. I therefore think that the judgment must be for the defendants in error.

LORD CAMPBELL. — This appears to me to be a frivolous writ of error. I understand there was an application that the Queen's Judges should be here, and it was supposed to be a matter of course that they should be here. Now, your Lordships are extremely anxious in a grave case, upon a question of common law, to have the assistance of those reverend sages of the law, and to pay great attention to them ; although your Lordships are not bound by their opinion. But to have summoned her Majesty's Judges on such a case as this would have been, as it appears to me, extremely preposterous. It should be understood that when there is a motive to summon the Judges, and your Lordships think their attendance necessary, they are generally summoned ; but it is by no means necessary * when there is a writ of error that the * 39 Judges should be summoned.

It seems to me that the counsel for the plaintiff in error very correctly stated in the course of his argument what is the law on this subject. A private person is not justified in arresting any of the Queen's subjects, unless there be a breach of the peace continuing, or unless he has reasonable ground to believe that a breach of the peace, which has been committed, will be renewed ; and it was stated, I think very correctly, that in a plea justifying an arrest and imprisonment, there ought to be a direct averment that there was a breach

of the peace continuing, or that there was a well-founded apprehension of its renewal. When I look at this plea, I think that both are positively averred. I cannot at all dismiss from my consideration the first part of this plea; for I think with my noble and learned friend that this is to be taken as part of the same transaction, for there was no cessation at all of the conduct of the plaintiff, and it is positively averred that the plaintiff “then immediately afterwards, and just before the said times when, &c., with force and arms, &c., again broke and entered the said close, &c., and again made a great noise, &c., and threatened to assault, and insulted and abused and ill-treated and showed fight to the defendants;” which last is an expression I never saw in pleadings before, but the meaning of which, I apprehend, is pretty well understood; “and then again forcibly obstructed and hindered the further erection of the said wall, and forcibly kicked and threw down a part of the same already built, and greatly disturbed, &c., the said trustees in the peaceable and quiet possession of the said close or yard, in breach of the peace of our lady the

* 40 * Queen.” Here is a positive averment that these acts were done in breach of the Queen’s peace; and can it be contended that it is possible to have an affray not in breach of the Queen’s peace? Then there can be no doubt that in that part of the plea all that is necessary is positively averred.

Now, let us see whether the continuation of that breach of the peace at the time of the arrest is not likewise averred. The plea goes on thus: “whereupon the last mentioned defendants, being such trustees as aforesaid, and having view of the said offences and misconduct of the plaintiff last aforesaid, &c., in order to preserve the peace and to restore order and tranquillity, and to prevent such breach of the peace in the said close or yard respectively.” Then a breach of the peace had been committed; whereupon, in order to restore tranquillity, and to prevent such breach of the peace being renewed, the arrest took place. Here is a positive averment that it was continuing; and, further, if we could suppose that it had ceased, — which I think there is no reason for supposing on this statement, — there are facts which are

abundantly shown from which it is not a mere matter of doubtful interference, but a necessary and inevitable implication according to the grammatical and usual sense in which language is employed, that there was a well-grounded apprehension that that breach of the peace would be renewed, and it was in order to prevent such renewal of it that the arrest took place. I am clearly of opinion that this writ of error is brought without reason, that it is frivolous and vexatious, and that there ought to be judgment for the defendants, with costs.

LORD COTTENHAM. — With respect to the question raised by the Attorney-General at the bar, with regard to * the counsel who signed the case not appearing to * 41 argue it, (a) it must not be supposed that that rule of the House is to be departed from ; because it is essential to the due administration of justice that this House should have the sanction of the counsel in the Court below, or of those who appear at this bar, for the purpose of maintaining any proceedings brought here by appeal or writ of error. There has been sufficient reason stated why the House should not insist on the rule in this case ; but it must not be understood that the rule is to be at all broken in upon or weakened. — (See the Standing Order, No. 58, Vol. VI., *ante*, p. 974.)

The judgment of the Court below was then affirmed, with costs.

(a) On the opening of the case by *Mr. Kelly*, the Attorney-General stated to the House that neither of the two counsel whose names were subscribed to the printed case of the plaintiff in error was counsel in the cause in the Court below, or attending as counsel in it at this bar.

1843.

JOHN JAMES HOPE JOHNSTONE, GEORGE GRAHAM BELL, JAMES HOPE STEWART, and	} <i>Appellants.</i>
WILLIAM STEWART	
MARY STEWART BEATTIE, an Infant, by Duncan Stewart, her Grandfather and next	} <i>Respondent.</i>
Friend	

Jurisdiction. Foreign Infant. Appointment of Guardian.

A Scotchman, by deed duly made in the Scotch form, appointed his wife and eight other persons—all domiciled and resident in Scotland—to be tutors and curators of his infant daughter. Upon his death, his widow and four only of the eight accepted the trusts of the deed. The widow afterwards, with consent of her cotrustees, brought the infant to England, and after residing for three years in various places there, for the health of both, the widow died, recommending the infant to the care of her grandfather, who was then residing in England. The grandfather filed a bill in Chancery, in the infant's name, for the sole purpose of making her a ward of Court, and preventing her removal to Scotland; and upon a contest arising between him and the Scotch tutors for the guardianship of the infant, the Lord Chancellor made an order, in the usual form, referring it to the Master to approve of proper persons to be guardians.

Held by the Lords (affirming that order) —

1. That the Scotch testamentary tutors were not testamentary guardians in England, according to the Act 12 Char. 2, c. 24.¹

¹ As to the authority of a father to appoint a testamentary guardian, see 2 Dan. Ch. Pr. (4th Am. ed.) 1350–1352; and as to the power of the Court over such guardian, see 2 Dan. Ch. Pr. (4th Am. ed.) 1352–1354. The rights and authority of guardians over the persons and property of their wards are, like the rights and authority of executors and administrators, strictly local, and cannot be exercised in other States. *Morrell v. Dickey*, 1 John. Ch. 156; *Sabin v. Gilman*, 1 N. H. 193; *Armstrong v. Lear*, 12 Wheat. 169; *Woodworth v. Spring*, 4 Allen, 321, 324, 325; *Kraft v. Wickey*, 4 Gill. & J. 322; *Burnet v. Burnet*, 12 B. Mon. 323; *Potter v. Hiscox*, 30 Conn. 508; *Leverick v. Adams*, 15 La. An. 310:

2. That the Court had jurisdiction to appoint guardians to the infant, although her domicile and all her property were situated in Scotland.²
 3. That the Court was bound to appoint guardians to the infant, being made a ward by the mere filing of the bill ;³ and although the Scotch testamentary tutors had the exclusive control of all her property, answerable to the Scotch Courts only, they had no authority over the infant in England, nor power to protect her ; nor entitled, by virtue of the deed of appointment, or by international law, to be confirmed or appointed her guardians in England. (*Dissentientibus* Lord BROUGHAM and Lord CAMPBELL.)
 4. That persons residing out of the jurisdiction may, if otherwise qualified, be appointed guardians jointly with a person who resides permanently within the jurisdiction.⁴
- Quære*, whether a bill filed to make an infant a ward of Court ought not to allege some right or claim of the infant to property within the jurisdiction, although untruly.⁵

March 27, 28; May 16, 26, 1843.

THE suit, in which this appeal arose, was instituted for the purpose of obtaining the appointment, by the Court of Chancery, of guardians to the respondent, * who was a * 43 Scotch young lady about the age of six years, and an orphan, residing in England, and possessed of considerable landed property in Scotland, but without any property in England or Wales. The appellants were Scotch gentlemen, regularly constituted tutors and curators of the infant by the

Townsend v. Kendall, 4 Minn. 412; Grist v. Forchaud, 36 Miss. (6 Geo.) 69; Warren v. Hofer, 13 Ind. 167; 2 Dan. Ch. Pr. (4th Am. ed.) 1355 and note (6) ; 2 Story Eq. Jur. § 1338 a. The appointment in Massachusetts of a guardian over a child, whose legal domicile is in another State, and who has a guardian appointed under the laws of that State, does not deprive the Court in Massachusetts of the power, in its discretion, to decree the custody of the child to the foreign guardian. Woodworth v. Spring, 4 Allen, 321; see Nugent v. Vetzera, L. R. 2 Eq. 704.

² See Stuart v. Bute, 9 H. L. Cas. 440; Dawson v. Jay, and *In re* Mary Jay Dawson, 3 De G., M. & G. 764; Hope v. Hope, 4 De G., M. & G. 328; 2 Dan. Ch. Pr. (4th Am. ed.) 1350.

³ See 2 Dan. Ch. Pr. (4th Am. ed.) 1347; Stuart v. Bute & Stuart v. Moore, 9 H. L. Cas. 440 ; s. c. 4 Macq. H. L. 1 ; 7 Jur. n. s. 1129; 2 Giff. 582; 7 Jur. n. s. 355 ; Williamson v. Berry, 8 How. (U. S.) 555; 2 Story Eq. Jur. §§ 1352, 1353.

⁴ See Woodworth v. Spring, 4 Allen, 321.

⁵ See 2 Dan. Ch. Pr. (4th Am. ed.) 1348; Hope v. Hope, 4 De G., M. & G. 343; Dawson v. Jay, 3 De G., M. & G. 771.

testamentary appointment of her father, a domiciled Scotchman ; and they had duly accepted that office. The question for decision was, whether the Court of Chancery in England could, consistently with the laws and rules which govern the proceedings of that Court in such cases, disregard the authority of those tutors, and place the young lady under the exclusive control and protection of guardians appointed by the Court.

The facts were these : Thomas Beattie, Esq., the father of the young lady, was a Scotch gentleman, born of Scotch parents, possessed of no property in England or Wales, but possessed of an estate at Crieve, in the county of Dumfries, of the value of 2300*l.* per annum, subject to certain burdens charged thereon, and also of some other property in Scotland. He married a lady of the name of Christina Stewart, a Scotch woman, also born of Scotch parents, and possessing no property in England or Wales, but entitled to a life-interest in an estate called the Glen-Morven estate, of the value of 700*l.* per annum, in the county of Argyll. In the year 1835, the respondent was the only surviving child of the marriage. Her father, having been advised to go to Madeira for the benefit of his health, before his departure executed the following deed, dated the 3d of October, 1835, and signed by two witnesses : —

“ I, Thomas Beattie, Esq., of Crieve, judging it to be
 * 44 proper and expedient to appoint tutors and curators * to
 the surviving child procreated, or the children to be
 procreated betwixt me and Christina Stewart or Beattie, my
 spouse, as shall happen to be within the years of pupillarity
 or minority at the time of my decease ; therefore, I hereby
 nominate and appoint the said Christina Beattie, my spouse,
 and John James Hope Johnstone, Esq. (the first appellant ;
 seven other gentlemen were then named, including the other
 appellants), to be tutors and curators to Mary Stewart Beattie,
 the child already procreated betwixt me and the said Chris-
 tina Beattie, and to any other children to be procreated of my
 body, whether male or female, of my present marriage ; de-
 claring that the majority of the above-named persons accept-

ing and surviving, and resident in Great Britain at the time, shall be a quorum, while there are more than two surviving ; and in case they shall be reduced to two or one, the whole office shall be vested in such surviving persons or person, with power to appoint factors, &c., and generally to do every other act and deed in the management of the affairs of my said child or children competent to tutors and curators by the law of Scotland, &c." (a)

Shortly after executing this deed, Mr. Beattie, with his wife and child, went to the island of Madeira, where he died in the month of April, 1836 ; whereupon his widow and the appellants alone, out of the persons named in the deed, accepted the office of tutors, the other persons named therein having declined to act. By this means the widow and the appellants became the sole tutors testamentary of the infant, and became bound by the law of Scotland to continue such tutors until she should attain her age of twelve years,

* when they would become curators, and so continue * 45 until she should attain her age of twenty-one years.

The appellants proceeded forthwith to perform the duties so reposed in them, and to manage the estate and affairs of the infant in Scotland, and complied with the requisites of the law of Scotland relating to such matters.

Mrs. Beattie, soon after the death of her husband, left the island of Madeira, and arrived in England with her daughter on the 5th of June, 1836. In the end of that month they went to Scotland, and resided for a short time at the family mansion in Dumfriesshire. In the month of November of the same year they went to Chester, where Mr. Duncan Stewart, Mrs. Beattie's father, then resided, he being collector of the customs there. Mrs. Beattie afterwards brought her daughter to London, but soon returned to Chester, and resided there for a year ; after which she came again to London, and resided for a year in a hired furnished house in Avenue Road, Regent's Park, and afterwards in a rented house furnished by herself in Albion Street, Hyde Park, hav-

(a) The deed is fully set forth in Mr. Phillips's Report, p. 17.

ing occasionally for short periods gone with her daughter to Hastings, for the benefit of the health of both.

Mrs. Beattie made her will in October, 1840, by which she appointed Adam Johnstone and Dr. Frederick Quin her executors, and bequeathed all she possessed to her father for his life, and after his death to her brothers. The will contained this passage: "My daughter is amply provided for; but it is my earnest request and prayer that she should be allowed to reside with her grandfather and my aunt Mrs. Buchanan, and that my cotrustees should not make any attempt to diminish the full allowance from Crieve and Glen-Morven during

* 46 her minority. My daughter *unluckily inherits, from both her father and mother, most delicate health, and will require every comfort and care to rear her to maturity; and I most earnestly implore the gentlemen of the trust to prefer my dear child's health and comfort to any saving for a fortune, which her delicate constitution, if not properly attended to, may never allow her to reach. I am now writing from a bed of sickness, from which it may be God's decree that I never rise; and I would fondly believe that the gentlemen of the trust will not have the heart to lend a deaf ear to this last appeal of a mother for her orphan child. May God forbid that my own desire that my daughter should pass her minority in the house and under the care of her natural protector and nearest blood relation, her grandfather, should meet with dissent: it is my dying request that she should have a governess in her grandfather's house, and never be sent to a boarding-school."

Mrs. Beattie died in Albion Street, on the 21st of December, 1840. Immediately after her death, the appellant, James Hope Stewart, by the desire of the other appellants, came to London, and made the necessary arrangements for the care of the infant, and for her remaining in England, which was considered by her medical advisers to be necessary for her health. He engaged a Miss Wells as a governess for her, that lady having been approved of and about to be engaged by Mrs. Beattie at the time of her death; and he continued an old confidential servant to attend upon the infant as she had done

theretofore, and left her also in the care of Miss Janet Graham Stewart, who was a relation of Mrs. Beattie and sister of two of the appellants, and who had, at the request of Mrs. Beattie, resided with her during her last illness. The appellant, * J. H. Stewart, returned to Scotland the 1st of January, * 47 1841, having previously arranged, provided his cotutors should agree thereto, that Mrs. Buchanan, the aunt of Mrs. Beattie mentioned in her will, should come from Scotland and take charge of Miss Beattie until the close of the term for which the house in Albion Street had been taken, which was to June or Michaelmas, 1841.

On the 6th. of January, 1841, Mr. Duncan Stewart, the infant's grandfather, without any notice to the appellants, filed a bill in the Court of Chancery, in the name of the infant as plaintiff, by himself as her next friend, against the appellants and the said executors, Adam Johnstone and Frederick Quin, stating the matters before mentioned; and also that the appellants and Mrs. Beattie, as trustees of the Scotch estates, had received the rents and profits of said estates to a considerable amount, and that the appellants had in their hands considerable sums of money on account of the said rents received by them in trust for the infant since her father's death, and that there was a considerable sum due to her on the like account from her mother's estate, possessed by her said executors. The bill further stated, that all the appellants resided in Scotland, out of the jurisdiction of the Court, and that there was no person within the jurisdiction empowered to act as guardian of the plaintiff, or to receive the rents and profits of the said estates, or apply them for the maintenance and benefit of the plaintiff; that her father had no legal relative at the time of his death; that the said Duncan Stewart, her mother's father, was her nearest living relative, and the said Mrs. Buchanan was another of her nearest relatives; that both these were to be permanently resident within the jurisdiction, and the plaintiff was * al- * 48 ways on terms of intimacy and affection with them, and was desirous that they should be appointed to act as her guardians. The bill prayed that the fortune and person of the plaintiff might be placed under the

Prayers of bill.

protection of the Court, and that Mr. Duncan Stewart and Mrs. Buchanan, or some other proper person or persons, might be appointed to be or to act as guardians or guardian of the plaintiff, and that all proper directions might be given for her maintenance and education; and that accounts might be taken, under the direction of the Court, of all the rents and profits of the said estates received by the appellants and Mrs. Beattie, deceased, as such trustees as therein mentioned, or by their order, &c., since the death of Mr. Beattie; and that the appellants, and the defendants Johnstone and Quin, as the executors of Mrs. Beattie, might be decreed to pay into Court, for the benefit of the plaintiff, what, upon taking such accounts, should appear to be due from them respectively, &c.; and that all other accounts might be taken and directions given which should be necessary for properly effectuating the purposes of the suit.

On the same day that the bill was filed Mr. Duncan Stewart presented a petition in the cause, in the name of the infant, containing the same statements as were contained in the bill, and praying that he and Mrs. Buchanan might be appointed to be or to act as guardians of the petitioner; and that it might be referred to the Master to inquire and state to the Court the infant's age and the nature and amount of her fortune, and what would be fit and proper to be allowed for her maintenance and education during her minority, and from what past period such allowance should commence, and out of what fund it should be taken. This petition was

* 49 supported by an affidavit, which * contained statements to the same effect as the statements contained in the petition, and testified the fitness of Mr. D. Stewart and Mrs. Buchanan to be guardians. And also on the same day, on the *ex parte* application of the infant's counsel, the Vice-Chancellor made an order appointing Mr. Duncan Stewart and Mrs. Buchanan to act as guardians of the infant, and referred it to the Master to inquire and state, &c., as prayed by the petition.

The appellants, shortly after this order had been obtained from the Vice-Chancellor, were informed of the proceedings which had taken place; and having then appeared to the bill, they in February, 1841, presented a petition to the Lord

Chancellor, setting forth, among other matters before mentioned, the aforesaid deed of Mr. Beattie appointing them tutors and curators of his child, and stating their own powers and duties acting under that appointment in the events which happened, and other grounds on which they conceived that the order of the Vice-Chancellor was erroneous. The petition, — after further stating that Mrs. Beattie did not by her will give any property to the infant; that there was nothing due to the infant from her mother's estate; that the infant had not acquired any English domicile, and had no property whatever in England; that in all the arrangements made by the petitioners for the education of the infant and management of her property, they considered solely what was most for her benefit, and they were perfectly able and willing to take care of her during her residence in England, — prayed that the said order might be discharged or varied; and that if his Lordship should think it proper to interfere touching the guardianship of the infant, the appellants might be declared to be, or, if they were not already such, might * be appointed to be guardians of the infant: but if his * 50 Lordship should think fit to interfere touching the guardianship, and should not think it fit to declare or appoint the appellants to be such guardians, then that his Lordship would be pleased to make such other order, by way of reference to the Master or otherwise, as to his Lordship should seem meet, having regard to the said testator's testamentary disposition, to his domicile, and to the circumstances and situation of the property of the infant; or that his Lordship might make such other order as the circumstances of the case might require.

This petition also came on to be heard before the Vice-Chancellor on the 19th of March, 1841; and after hearing the matter fully debated on both sides, and hearing the several affidavits by which the petition was supported and opposed, his Honor ordered that his former order, dated the 6th of January, should be discharged, and that the appellants should be appointed to act as guardians of the infant during her minority, or until the further order of the Court, without prejudice to the question whether the appellants were entitled

to the guardianship of the infant, under the Statute 12 Charles 2, c. 24, § 8.

Mr. Duncan Stewart, in the name of the infant, presented a petition of appeal from this last order, to the Lord Chancellor; and this petition came to be heard before his Lordship on the 17th of April, 1841, when his Lordship ordered that the Vice-Chancellor's order, dated the 19th of March, be discharged, except so far as the same discharged the order dated the 6th of January; and that it be referred to the Master to approve of a proper person or persons to be appointed the guardian or guardians of the infant: and the Master

* 51 was to inquire and state to the Court the infant's * age, and what relations she had, and the nature and amount of her fortune, and also on what evidence or ground he should approve of any particular person or persons to be such guardian or guardians: and the Master was also to consider of a scheme for the residence of the infant, and what would be proper to be allowed for her maintenance and education, to commence from the 2d of December, 1840, the time of her mother's death, and for the time to come during her minority; and to state out of what fund such allowance ought to be paid: and after the Master should have reported, such other order should be made as should be just. (a)

This was the order now appealed from.

From the affidavits read before the Vice-Chancellor, on the hearing of the appellants' petition, and afterwards before the Lord Chancellor, on the appeal to him, and set forth in the printed cases, the following extracts are made of the material passages, which were frequently referred to in the arguments on this appeal, and by the Lords in their judgments.

Evidence. The affidavit made by the appellants on that occasion stated—among other things which were also stated in their petition—that Mr. Beattie's deed of

(a) See his Lordship's judgment, 1 Phillips, 80.

nomination of tutors and curators was, according to the law of Scotland, an instrument of a testamentary nature, and that by the law of Scotland a tutor appointed by a father was, after the death of the mother, vested with the management of the person of the infant; and that the same deed being a document of a testamentary nature, constituted a good appointment of deponents not only to be tutors according to the law of Scotland, but also to be guardians of the infant according to the law of England. And the deponents said that they were informed and they believed that Mrs. Beattie, by her will, bequeathed all the property she had to her father for his life, and after his death to be divided among her surviving brothers; and that she * did not * 52 by her will bequeath any property whatever to her daughter, the infant plaintiff, and they did not believe that there was, as alleged in the bill, a considerable or any sum of money due to the infant from her mother's estate, and they verily believed that the infant had not any property whatever in England. And deponents said that they had for nearly five years duly managed the affairs of the infant in Scotland, and complied with the requisites of the law of Scotland in regard to giving up inventories of her property; and further, that they had held meetings yearly, at which they audited the accounts of the factor or receiver, and deposited the surplus rents in the Bank of Scotland, as directed by the deed of entail of the estate of Crieve, and they acted in all respects in accordance with the law of Scotland, and in conformity with the advice of Scotch counsel. And deponents said they were advised and believed it would be most inexpedient, and lead to a collision of laws and forms, if the Court of Chancery in England were to supersede the guardians appointed by the father of the infant according to the law of Scotland, and any expenditure for the maintenance of the infant would be liable to be overruled by the law of Scotland. And deponents said, that in the arrangements which were made by them, they considered solely what was most for the benefit of the infant; and it was their intention, unless superseded, to consider what would be most for the health and benefit of the infant in the manage-

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ment of her education, and the choice of her residence. And they said that they could take care of the infant in England, while it might be expedient for her to continue in that part of the United Kingdom ; and that the most anxious solicitude and attention had, since the decease of her mother, been entertained for and bestowed upon the infant by these deponents, and also by Miss Graham Stewart, the sister of the deponents J. Hope Stewart and W. Stewart, who took charge of the infant by their direction.

The following is an extract from an affidavit made in support of the appellants' said petition, evidencing the law of Scotland on the subject: —

John Marshall, of Edinburgh, Esq., advocate, and James Newton, of the same city, Esq., writer to the signet, severally said, that they had severally been admitted as an
* 53 advocate * and as writer to the signet, and had respectively acted and practised as such in the Court of Session in Scotland, for upwards of twenty years ; that they were well acquainted with the law of Scotland, as respected the nomination and duties of tutors or guardians according to that law. And these deponents said, that by the law of Scotland the nomination by a father of tutors to his infant child, invested the tutors named in his deed of appointment, and who accepted the office of tutors, with the guardianship of such infant until such infant attained the age of twelve years, if a female, and fourteen if a male ; and particularly that a deed of nomination by the father conferred upon such accepting tutors the right to the custody and charge of the person of the infant ; and that this right of custody belongs to the tutors, to the exclusion of all other persons whatever, except in the case where the tutor happens to be the person who would succeed as next heir of the infant, in the event of his or her death, and excepting also in the case where the infant's mother is alive : that the mother is entitled to the custody of an infant whose father is dead until the infant attains the age of seven years, provided the mother remains a widow, but no such right of custody belongs to her rela-

tions upon her decease; and that even in a case where the mother was alive and remained the father's widow, a tutor nominated by the father has been held to be entitled to change the residence of an infant under seven years of age for the sake of education, without the consent of the mother.

An affidavit made by Mr. Duncan Stewart, in opposition to the appellants' said petition, contained several letters from Mrs. Beattie to him, set forth for the purpose of showing that she abandoned her Scotch domicile. The first of them was dated from Margate, the 5th of June, 1836, upon her arrival from Maderia, and contained the following passage: "When I reach London I hope you will be able to come and see me; my stay there will depend entirely on what the doctor says of Mary. Dr. Benton says it is madness attempting taking her to Scotland; but I shall be guided entirely by the opinion of the best medical men in town."

Another letter written by her, from Edinburgh, on the 28th of the same June, contained this passage: "I saw William * Stewart, and am sorry to say that affairs ap- * 54
pear in considerable confusion; my allowance for Mary is to be 290*l.*, and my jointure only 399*l.*, which I confess puzzles me, as I always understood it was to be 500*l.* This makes my income 995*l.*; and I therefore wish to know if you think that you and I could live quietly at Chester, on 500*l.* per annum, as I do not wish to spend more than 400*l.*; and indeed, considering there will be no increase of allowance as Mary grows up, it will be quite necessary to make a little fund. Would you, my dear father, write me the expense of a neat small cottage in your neighbourhood, the price of butcher's meat, bread and coals, and, in short, every particular that occurs to you?" "And before asking you to take the trouble of making these inquiries, it may be well to mention, that having been so long accustomed to manage my own house, no arrangement would be comfortable to me unless I considered the establishment entirely my own. As I expected, William Stewart is throwing out hints already about Murrayfield, and was much surprised to find I intended to make a short stay in Scotland, and said he consid-

ered a Scotch climate, in autumn, equal to any other; but I told him frankly that I did not mean to have any opinion on the subject myself, and that it was a matter of too much consequence for me to take the advice of any unprofessional person; so I hope he will say no more."

Another letter, written by Mrs. Beattie from Murrayfield, the mansion on the Crieve estate, the 11th of July, 1836, and set out in the said affidavit, was partly as follows: "I arrived here on Friday night, and stood the journey very tolerably. My cough is a great deal easier, and I breathe more freely than when I saw you. I am sorry to say that my affairs still appear in the utmost confusion, and William Stewart is certainly not the man to lessen it; he has not offered me one sixpence, although the greatest pains have been taken to make me aware that, till Martinmas, I have no right to claim one farthing from my jointure, or even Glen-Morven, from the lease having been unfortunately taken in Mr. Beattie's name. I tried an insurance on my life, but they refused me, even at an office that takes extra risk, so that it will be the greatest kindness if you could send me a little sum." "I am afraid it does not rest with myself

whether I shall remain here all the winter or not, as it
 * 55 is out of the question * my taking up my residence in any strange place without funds; here I dare say I can go on better, as the tradespeople know me."

Mr. D. Stewart's said affidavit also contained the draft of a letter alleged to have been written by Mrs. Beattie to the appellant, W. Stewart; there was no date. The following are extracts: —

"Since the receipt of your letter I have not ventured to trouble you about my unfortunate affairs, for both the tone and matter of that letter gave me little cause to hope for either friendly advice or assistance from you, in the way I proposed, to extricate myself from the difficulties into which my youth and ignorance of business has led me. Under these circumstances, I have been forced to apply to others for counsel, and have in consequence been obliged to lay open all my affairs, together with the papers and correspondence connected with them since my return from Madeira. The remarks and

observations which have been made upon them, have opened my eyes to the cruelty of the position in which I have been placed by my inexperience of worldly matters. I quite agree with you, that it is very much to be regretted that all the debts had not been paid, or settled in some way or other with the first loan ; but surely this is not my fault. To you, as my man of business, as my husband's legal adviser and friend, I naturally looked for advice and assistance in my bereft situation. The sole object of my burdening myself with a debt of 5000*l.* was to liquidate the whole of the debts, which I was assured by you did not exceed 4000*l.* : I could only act under the guidance and advice of those whose duty it was to ascertain the whole amount that was owing, before a single farthing was paid to any one." " This cannot now, I fear, be altered, but it is undeniable that had more caution and kind forethought for my interest been used, that I might, indeed ought, to be now free from all debt and annoyance ; for there cannot, I am told, be a doubt, that had the creditors been assembled, or, in accordance with my childish idea that such matters could be kept secret, each applied to separately, and matters stated fully to them, they would willingly have accepted the 5000*l.* in payment of their whole demand ; the more so as not one of them had the slightest claim upon me personally. I have recapitulated these matters with no wish to convey reproach, but in the * earnest hope and * 56 expectation that when you have weighed the hardship of my position, and how much I am the victim of my disinterested intentions, that you will not refuse your assent nor your influence with the other trustees to obtain theirs to the following plan, which has been pointed out to me, for extricating myself from the difficulties under which I still labour." (The plan was then stated.) " I do hope, when you have maturely considered all this, that you will use every endeavour to obtain the joint consent of the trustees by giving the proper bond of security. Mr. Beattie on his death-bed consoled himself, and often repeated to me the comfort it gave him, that I should be aided by your assistance and caution ; and that all the persons named in the trust were fully aware of his love and liberal intention to his wife ; could he see how that wife

is now placed, how unhappily, and how unprotected: I appeal to all your better feelings, to prove your willingness to aid the widow of your departed friend. Your influence with the other trustees is not unknown to me, and I anxiously hope that you will now exert it in my behalf. Your's truly, C. BEATTIE."

The said affidavit of Mr. D. Stewart, contained a letter written to him by Mrs. Beattie, the 23d of August, while she was residing in Albion Street, Hyde Park. The following are extracts: "Pray, dear papa, read this as the thoughts of a child expressed to a parent; and be assured that any remark you may make, or any opinion you give, will be well received by me. Though I told you that I did not agree with the medical men, as to my lungs being more affected than they have been for some time, I am firmly persuaded that my illness is of a very serious nature; and that with my weakened constitution, there is little chance of my recovery. I do not deceive myself, my dear father, when I say that I am wasting away very gradually; and unless some great change takes place for the better, that things cannot last as they are for a very long while. I expressed to you my earnest wish, that, in the event of my death, Mary should reside with you. Her present excellent health, thank God, relieves me of all anxiety about her; but my own ailing state makes me very much alarmed to take

another house; for the thought of my dying without any
* 57 relation near me, is a very lonely and gloomy * prospect.

Now, what I was going to say is, that if, without inconvenience to yourself, you could meet with a house which is a little larger than your present one, and would allow us to come and visit you, it would be the greatest possible comfort to me; that in the event of any thing happening, you would be on the spot to take charge of my poor child. I have the less delicacy in suggesting this arrangement to you, because, should it meet with your approval, and that nothing occurs to make this plan undesirable, my furniture could be sent down to you, and would not, of course, be removed again. Herbertson (her servant) tells me that Miss Hawkins's house was about 25*l.* of rent, and she has often said it would be a most suitable house for you. If you should think so, and that the year's rent of your present house was likewise included,

together with the expense of the furniture going down, it would not amount to more than the rent I was to give in Albion Street, 657. If God spares me and restores my health, I might be able to enjoy going to the Highlands for a month or two next summer; but whatever our future arrangements may be, it is a most natural thing that a sick, perhaps a dying, daughter, should find a resting place in her father's house. If I remain in London, I am too ill at present to receive a stranger into my house; but if we go to you, it will be my earnest desire to get a very superior person to take charge of Mary, and also to be a companion to me. If fortunate in meeting with a lady-like and desirable person, I would leave this world with comparatively little anxiety on my mind, for I am sure that as long as you live the child will be tenderly cared for. Even in the event of my getting worse, and being advised to go to a milder climate, I would be much happier in leaving all my worldly belongings under your care than any one else's."

Another letter, from the same to the same, dated the 28th of the same month, and set forth in the same affidavit, contained the following: "When I wrote to you about Miss Hawkins's house, I liked the idea of it, because the rent was so moderate, that whatever change might eventually have taken place, it would always have been a great pleasure to me to have kept it on, and to have spent always part of the year there as long as you were in Chester." "Of the house in * Albion Street, there is hardly a doubt but it * 58 will be let, and could be so many times over, on account of the situation; and immediately on receipt of your letter of yesterday, I had inquiries made, and found several were desirous of taking it, so that it is no anxiety to me, and I have every belief that both Doctor Quin and Mr. Johnstone will do every thing in their power to gratify my wish when I express it to them. I like your account of the house in Stanley Place very much indeed, and I am sure with you and a good governess, both to look after my dear child, I shall be easier in my mind than I shall be anywhere else; but until I have communicated with these gentlemen, I cannot venture to ask you decidedly to take it." "My own strong wish is just to

get comfortably settled; I have no idea that going abroad would do me any good, but I am quite sure that to see you happy, and Mary falling into good hands, will add greatly to my peace of mind; and this cannot be the case unless I am with you."

The affidavit containing these and other letters, further added, — "That it was considered more desirable that Mrs. Beattie should continue to reside in London; and accordingly, in September, 1839, she finally resolved to take up her permanent residence there, and entered into an agreement for the house in Albion Street for three years from Michaelmas, 1839; and she purchased furniture for the said house, and took up her residence there, and continued to reside therein until her death." The deponent (Mr. D. Stewart) then proceeded to say, that he instituted this suit with the approbation of all the nearest relatives of the infant, who were in London, and best qualified to judge of the propriety of such a step, and who fully knew the situation in which the infant was left; and he verily believed, that except the four defendants, and a few of the members of the families of some of them, all the relations and connections of the infant, and those most interested in her welfare, had been satisfied with the course pursued by this deponent in making her a ward of Court, in order to fulfil the wishes of his deceased daughter.

The following extract from an affidavit made by Dr. Quin, on the same occasion, was also frequently referred to by * 59 the * counsel on both sides, upon the question of domicile: "And this deponent says, that in or about the month of April, 1838, the said Christina Beattie came to town, and resided for some time in a house on Avenue Road, Regent's Park; and he says, that not finding the house comfortable, she, on several occasions, consulted him respecting the choice of some other fixed residence in England; and in or about the month of September, 1839, having determined to fix her permanent residence in London, she took a house in Albion Street, Hyde Park, under a written agreement, for a term of three years; which agreement is now in this deponent's possession, as one of the executors. And this deponent

says, that she furnished the said house in Albion Street, and went to reside there and continued to reside there until the time of her death. And this deponent says, that from frequent conversations he has had with the said Christina Beattie, he is perfectly satisfied that it was the full and deliberate intention of the said Christina Beattie to fix her permanent residence in England, and that she had no intention of ever returning to reside in Scotland, or of ever going to Scotland again, except for temporary purposes, if at all; and shortly before her death she exacted a solemn promise from this deponent that he would not allow her to be taken to Scotland to be buried."

A second affidavit by the appellant W. Stewart contained the following extracts from a letter written by Dr. Quin to the appellant J. H. Stewart, at Mrs. Beattie's request and dictation, shortly before her death : —

" Your letter of the 14th instant has had a most gratifying and calming effect upon Mrs. Beattie's mind, which has been long most painfully anxious respecting her beloved child's future residence and rearing. The kind solicitude you evince for dear little Mary, and the desire shown to study her mother's wishes, have gone far, you will be gratified to learn, to lighten her anxiety." " The strong affection which her father has for Mary, and the devoted love and attachment which the child has ever shown for her grandfather, were guarantees to her that nowhere could her daughter be so happy and so tenderly taken care of as under the roof of her grandfather and aunt. It would be wrong in me to hold back

* that I am aware that another motive has operated * 60 strongly on her mind, only secondary to her anxiety about her child's future welfare. The pecuniary difficulties in which she found herself placed since her husband's death (which difficulties she attributed to the diminution in her income, arising from the yearly sum set aside for the interest, premium, &c., on the money raised to discharge Mr. Beattie's personal debts) have prevented her from assisting her father and brothers as the natural generous dictates of her kind and affectionate heart would have prompted; and besides being in consequence incapacitated from doing any thing for her own

family during her life, she has deprived herself of the power of making any provision for them after death. These circumstances, she conceives, greatly strengthen her claims on the good feelings of the guardians to have her wishes complied with respecting the child's residence with her own nearest relations in preference to strangers, as far as it is compatible with her daughter's health and welfare, and the guardians' sense of their duty to the minor." "I have particularly drawn Mrs. Beattie's attention to that part of your letter, wherein you state your anxiety that she should express her sentiments as to the person to be entrusted with the charge of Mary, and that your own impression was that a lady with a cheerful and healthy family about Mary's own age, &c., and likewise to what you so justly say of the qualities most essential in the governess to be chosen. It is Mrs. Beattie's wish that a governess such as you have described her, and Mary's present nurse, should be constantly with the child; that the governess should have the sole control of the education and rearing of her charge, and be answerable to no one but the guardians, even when residing in the house of her grandfather: and that when it is necessary to remove her for the winter months elsewhere, it is her wish that Mary, her governess, and attendant, should all be boarded in some eligible family, and that the control should still remain solely with the governess. On my begging to know if she wished me to mention any one to you with whom she would prefer Mary to board in summer, she replied that she must leave that to the guardians to settle, and that circumstances as they arise

* 61 at the moment would decide their choice and * the place of summer residence; but that she trusted that, in consideration to her, they would consult with the child's grandfather on the subject, whose every feeling must be enlisted in a proper selection. I have now faithfully transmitted Mrs. Beattie's wishes to you, and I trust that in doing so I have not diminished your desire to consult them in fixing the future residence of your precious little charge."

The letter of J. H. Stewart, in the above referred to, was set forth in a second affidavit by Dr. Quin, who had it from Miss Graham Stewart, to whom J. H. Stewart wrote it. The

following are extracts: "Mrs. Beattie, as I learn through the channel I have mentioned, has expressed anxious wishes that her daughter shall reside with Mr. Stewart and Mrs. Buchanan, at Chester; a wish that indicates her natural affection for her father and aunt, and her reliance on their care and tenderness. I am convinced such reliance would be met by the most affectionate solicitude and attention on the part of our friends and relatives; and as far as my feelings go, there are none with whom I would rather see our interesting charge placed. But yet I cannot but see some obstacles to a permanent residence with these kind friends. Mrs. Beattie, I hear, has very properly enjoined consultation with Dr. Quin, before Mary is removed from her present abode. This is clearly what ought to be done. Now, if he disapproves of a removal during the winter and spring to any place north of London, there will arise cause for consideration as to the most eligible situation until these months pass over. Probably Dr. Quin may not be opposed to her residence in Chester, or even in Scotland, during the summer; but I apprehend that he may counsel that the south of England be her quarters in the cold season for many years. Seeing the probability of such advice from Dr. Quin, I do feel most anxious that Mrs. Beattie should consider and express her sentiments as to the person to be entrusted with so precious a charge. My own impression is, that if a lady with a cheerful and healthy family of children about Mary's own age could be discovered, there would be the most eligible place of abode; the locality to be fixed, of course, by Dr. Quin. The cheerful society of well-brought-up children I must think of the utmost importance to the dear * girl's health, and to * 62 her happiness also. A governess, whose kindness of temper must be more looked to than accomplishments, will of course be always with Mary, whether she be in the southern or northern part of the kingdom. The greatest caution and solicitude must be exercised in finding such a person. It gives me inexpressible pain to write all this, which I must request you to show to Mrs. Beattie, or communicate to her at such time and in such a manner as you may judge are least likely to disturb her. I would have addressed my sentiments

to herself directly, but supposing that you may introduce the subject in the quietest and least agitating form, I have taken this method." "And this deponent says, that Mrs. Beattie being made aware of the said letter by Miss Stewart, conversed with this deponent thereon; and being gratified by the kind expressions contained therein, and believing from the tenor of the said letter that the wishes respecting her child contained in her will would be attended to by the trustees, she requested this deponent to write to J. H. Stewart in reply, and he did accordingly write to him the letter of the 18th of December, 1840, set forth in the affidavit of the said W. Stewart; and such letter was written only three days before Mrs. Beattie's death, and she was at the time much distressed and exhausted by her conversation relating to it: when this deponent, having written the said letter by her bedside, read it over to her, she pointedly asked whether he considered there was any thing in the letter likely to prejudice the claim for her child which she had made on the trustees by her will; and this deponent assured her, on the contrary, that he considered that the said letter would be more likely to have the effect of having her wishes acceded to than if she put herself in opposition to the trustees; and under this assurance she consented to the said letter being sent. And deponent says, that Mrs. Beattie more than once afterwards recurred to the said letter, and conversed with this deponent about the future residence of her said child, making this deponent solemnly promise to do his utmost to see her will carried into effect." "And this deponent says, that on more than one occasion Mrs. Beattie expressed, in this deponent's presence, her wish to have her child made a ward of Court during her life; but this deponent always

* 63 dissuaded her * therefrom, fearing the fatal effect which the agitation likely to arise from legal proceedings would have upon her delicate state of health."

The following extract is from an affidavit made by Mr. Hart Dyke, of Doctors' Commons, on behalf of the appellants, upon the appeal before the Lord Chancellor: "Deponent saith that nominations of tutors and curators by a father, in the form of the said paper writing, or extract, registered nomination of

Mr. Beattie, are always treated and considered by the Prerogative Court of the Archbishop of Canterbury as testamentary. And deponent saith, that if Mr. Beattie died a domiciled Scotchman, leaving personal effects in the province of Canterbury, but without having executed any other testamentary instrument than the said instrument of nomination, the defendants (the appellants), as the accepting tutors of the infant, would now be entitled to a grant of administration for the benefit of the infant; and the said Prerogative Court would now, according to its usual and constant practice, grant administration to the defendants as such accepting tutors, without requiring a guardian to be appointed by the Court of Chancery."

Mr. Turner and *Mr. Romilly*, for the appellants. — By the principle of the order now appealed from, no distinction is made between English and foreign infants; Miss Beattie being a foreign child temporarily residing here, the Court of Chancery had no jurisdiction over her. The origin of its jurisdiction in appointing guardians to infants is derived from the authority of the Sovereign as *parens patriæ*, (a) delegated to the Lord Chancellor or Lord Keeper of the Great Seal, to be exercised by him for the benefit of the subjects of the Sovereign. There is no instance of its exercise over foreign infants without domicile or *property in this kingdom. The early *64 cases show that it was confined exclusively to the infant subjects of the Crown of England, domiciled within the jurisdiction of the Court, or possessing property under its control; though it was afterwards extended to persons not falling exactly within that description.

This infant was only temporarily resident in England. There is no doubt that the domicile of origin, the domicile by birth, of herself and both her parents, was in Scotland. It is equally certain that they all retained their Scotch domicile while they resided in Madeira, where they went and sojourned

(a) See *Wellesley v. The Duke of Beaufort*, 2 Russ. 20.

for the benefit of Mr. Beattie's health. Upon his death Mrs. Beattie came with her child to England, thence proceeded to the patrimonial estate and mansion in Scotland, and after a short residence there came again to England, avowedly for the benefit of the health of herself and child. The mother continued up to the day of her death wholly undecided where to fix her abode, declaring frequently that her choice would depend upon the advice of the medical gentlemen whom she consulted. All her movements were referrible to the health of herself and child, and also to economy in living, with a view to disencumber the patrimonial estate. Her letters, set out in her father's affidavit with the evident object of showing that she abandoned her Scotch domicile, do not establish that conclusion, but show that her mind wavered between London and Chester, with reference to health and a reduction of the expenses of living, and that she had no intention to stay in either place longer than was compatible with those objects. By Dr. Quin's advice she rented the house in Albion Street for a short period; and though she furnished it, so far was she from intending to reside permanently there,

* 65 that she * proposed to her father to send the furniture to Chester. But even though she might have intended to abandon Scotland and reside permanently in England, intention alone is not sufficient to change the domicile of origin, which is never lost until a new domicile is actually acquired *ex animo et facto*. *Somerville v. Somerville*, (a) *Munroe v. Douglas*, (b) *The Harmony*, (c) *Attorney-General v. Dunn*, (d) *Warrender v. Warrender*, (e) *Munro v. Munro*; (g) *Story's Conflict of Laws*, c. 3; 1 *Burge's Comm. on Col. and For. Laws*, c. 2.

If the mother did not change her domicile of origin, the infant's was not changed. The infant herself was incapable of the intention of choosing a new domicile; she could not acquire a domicile of her own by her own act, until she passed the state of pupillage and became *sui juris*. *Wallace's*

(a) 5 Ves. 750.

(b) 5 Madd. 379.

(c) 2 Robin. Adm. Rep. 322.

(d) 6 M. & W. 511.

(e) 2 Cl. & Fin. 488.

(g) 7 Cl. & Fin. 842.

Case, (a) and per Sir W. GRANT in *Somerville v. Somerville. (b)* Even though it were admitted that the mother did change her own domicile, it may be doubted whether she had power to change that of her child. The authorities on that point are not consistent. A guardian, it is said, cannot change a ward's domicile; but that a surviving parent may, was held in the case of *Potinger v. Wightman, (c)* in which Sir W. GRANT said that the domicile of the children follows that of the surviving parent. In that case the parent had been herself a guardian of the children, and had the consent of the other guardian; but in this the parent had the guardianship in conjunction with the other tutors and as their agent, without whose consent she could not remove the infant. *Scots v. Scot, (d)* * *Walker v. Walker. (e)* She recog- * 66
nized the power of the tutors, as appears from her will and from her letters, and particularly from the letter written by Dr. Quin at her dictation to J. H. Stewart.

[THE LORD CHANCELLOR. — The case of *Potinger v. Wightman* appears to have been well argued and well considered, and must be held conclusive as to the mother's power to change the domicile, — which is a novel point in the law of England, — unless there is some opposite decision.]

The only other authority that we can find is the *dictum* of the Lord Ordinary in the case of Wallace, in a note in Mr. Robertson's book on Personal Succession. But the law of Scotland declares that the mother cannot remove the child against the wishes of the tutors testamentary. Ersk. b. 1, tit. 7, § 17. The tutors may fix the place of residence for the child, though they cannot deprive the mother of the custody if she continues a widow and resides where they appoint.

[THE LORD CHANCELLOR. — Suppose the appellants to be testamentary guardians, may they not, for residing abroad or

(a) Rober. on Succ. 201.

(b) 5 Ves. 787.

(c) 3 Meriv. 67.

(d) Morr. 16361.

(e) 2 Shaw & D. 788.

other cause, be removed, and new guardians be appointed by the Court to the infant residing here ?]

Not without a bill filed for the purpose of removing them. Lord COTTENHAM, in his judgment in this case, says the Court cannot change testamentary guardians. (*a*)

[LORD COTTENHAM. — Where there is no acting guardian, the Court may appoint one ; and so it may if there are testamentary guardians who act improperly (*b*) or go out of * 67 the jurisdiction ; in either case * the Court will interfere to protect the infant. The appellants, in their petition to the Court below, claimed, by virtue of the deed appointing them and others tutors and curators in Scotland, to be testamentary guardians within the Act 12 Charles 2, c. 24. Their counsel did not press that point before me ; but I distinctly stated my opinion to be, as it still is, that they were not testamentary guardians.]

The inference from what they alleged in their petition is, that as tutors and curators of the infant, they have the same authority that English testamentary guardians have ; and that the Court is bound to recognize them in that character. There is a case, *In re Lewis*, (*c*) in which the Master of the Rolls in Ireland refused to remove a guardian residing out of the jurisdiction on that ground, no authority being found for such a proceeding.

This infant has no property within the jurisdiction of the Court of Chancery. The appellants appeared voluntarily to the bill, for the purpose of getting rid of an erroneous order ; admitted by the learned Judge who made it to be erroneous, for he discharged it. Had they chosen not to appear, the Court could not make any effectual order against them. Though the bill alleged that the infant was entitled to an account from her mother's estate in England, it now appears

(*a*) 1 Phill. 31.

(*b*) See *Duke of Beaufort v. Bertie*, 1 P. Wms. 703.

(*c*) 2 Molloy, 485.

that that allegation was false, and it is distinctly denied in the appellants' affidavits. The infant's property being all in Scotland under the lawful protection and management of the appellants, no order of the Court of Chancery could reach it, except by appointing a receiver, who should further apply for power to the Scotch Court. That *Court *68 might aptly say: "If you ask us, by the comity of nations, to enforce your order, you must first set the example of comity by respecting, in England, the tutors acting under Scotch law."

It is of the utmost importance to the interests of the infant, to have herself, as well as her property, under the guardians appointed by her father. If other guardians be appointed in England, there must be two sets of accounts, taken possibly on different footings: first, an account by the curators of the infant's property, according to the rules of the Scotch Courts; secondly, an account of the expenditure of the allowance to the infant by the English guardians, agreeably to the rules of the Court of Chancery; and there may be danger of collision between the orders of the Courts in the two countries. By the article of the Union, no Court in England can interfere with the orders of the Scotch Courts. This order is not only inconsistent with the rights of the Scotch nation, as secured by the Act of Union, but its principle, if acted upon in future, may be productive of serious consequences to our international relations with other foreign countries. If the Court of Chancery must interfere with the testamentary tutors, the safest course will be to appoint or confirm them as guardians of the infant in England, by restoring the second order of the Vice-Chancellor, by which these four gentlemen were appointed guardians. They submit, and are willing and desire to accept the guardianship, under the jurisdiction of the Court of Chancery. There is no objection personally to them; it is not alleged that they are not proper persons to be appointed by the Court, as they have been appointed by a solemn instrument by the infant's father.

[THE LORD CHANCELLOR. — Suppose a child came here from a West India colony with its mother, and *the *69

guardians appointed by the father's will remained in the colony, would they or the Court of Chancery have the guardianship? I refer to the case *Ex parte Watkins*, (a) in which Lord HARDWICKE, on petition to him for the appointment of a guardian, directed a reference in the usual terms to the Master, entertaining no doubt of the jurisdiction.]

There is a distinction between foreign children and children from our colonies. The governors of colonies have only a limited power of appointment of guardians of infants, or committees of lunatics, confined to the colonies; and therefore, if infants or lunatics come here from the colonies, the Lord Chancellor will appoint new guardians and committees. *Ex parte Watkins; In re Houston.* (b) Subjects of the Crown are entitled to its protection, especially if there be no guardians in this country, and communication with the colony is tedious. But if a French or other alien child, residing here for temporary purposes, and having guardians or tutors regularly appointed ready to offer their protection, the Court would first refer to them. When guardians have been lawfully appointed by the father of a child, according to the law of the country in which both are domiciled, and where their property is situated, and with which alone they have any connection, the quality of such guardianship, and its effect on the *status* of the child, must accompany that child everywhere, must be acknowledged and recognized in every other country, (c) as much as the guardianship of the parent;

* 70 and if the child is casually * in England by the act and consent of the guardians, the duty of the law of England is to look solely to these guardians, to acknowledge them as much as it must do the parent, and to protect their legal *status* as a part of the inherent *status* of the child, not to interfere with or supersede them. That doctrine has been recognized and acted upon in the cases of persons found lunatics in foreign countries, where guardians or committees

(a) 2 Ves. Sen. 470.

(b) 1 Russ. 312.

(c) See the doctrines of jurists and the cases collected by Mr. Burge in his *Comm. Col. and For. Laws*, vol. 1, pp. 14-25; and vol. 4, p. 1003 *et seq.*; and by Dr. Story, in his *Conf. of Laws*, c. 13.

had been appointed by a competent tribunal there. *Ex parte Otto Lewis.* (a) It may be admitted that the Court of Chancery has a qualified jurisdiction to enforce the orders of foreign Courts, by the comity of nations, to be exercised as an auxiliary jurisdiction, at the instance and for the assistance of the parents or other natural guardians of infants; but never as an engrossing jurisdiction, superseding the authority of parents or guardians duly appointed.

The appellants being duly appointed guardians in Scotland, ask that effect may be given to that appointment in England, as like appointments in England would be recognized in Scotland. *Nasmyth v. Nasmyth*, (b) *Balfour v. Scott*. (c) They do not object to be associated in the guardianship with Mrs. Buchanan, who may properly have the custody of the infant; but, without imputing any personal fault to Mr. Duncan Stewart, they feel that they cannot act with him.

[THE LORD CHANCELLOR. — If the order appealed from were to be discharged, except so far as it discharged the Vice-Chancellor's second order, which was made on the appellant's petition, there would be no order.]

If the Lord Chancellor's order be simply discharged, the Vice-Chancellor's second order will be revived, and the authority of the tutors recognized.

* The order appealed from is not supported by any * 71 general principle applicable to the protection of infants in this or any other country; nor by any particular principle regulating the interference of the Court of Chancery in such cases. The governing principle of that Court, in interfering in the appointment of guardians, or of persons to act as guardians of infants, is that the welfare of the infants requires such interference. This order cannot be supported on that ground; on the contrary, it will produce serious injury to the prospects of this young lady. Her property is all in Scotland, and there also are her friends and relations, except her grandfather, who is only temporarily residing in England

(a) 1 Ves. Sen. 298.

(b) Morr. 4455.

(c) 6 Bro. P. C. 550; and cases in App. 566 *et seq.*

as an officer in the customs. It being the practice in the Master's office to approve of none but persons permanently residing within the jurisdiction to be guardians, the appellants, who were selected by the father to protect the infant and her property, must be excluded from the office of guardians, and some persons in England or Wales appointed to that office. The infant herself cannot, before she attains the age of twenty-one years, be allowed to depart from this country (*Mountstuart v. Mountstuart*, (a) *De Manneville v. De Manneville* (b)) without the leave of the Court, to be obtained only upon special circumstances, and sufficient security for her return when required by the Court. *Jackson v. Hankey*, (c) *Campbell v. Mackay*. (d) She cannot visit her native country or her relatives, or become acquainted with her property or her tenants, or cultivate with them that mutual good feeling and sympathy which are usually productive of reciprocal advantages to landlord and tenant. That state of things surely cannot be for this infant's benefit.

The rules of the Court of Chancery, which have been acted upon by all the Judges who have presided in that Court, compel its interference in some cases to remove an infant from the care and authority of even its father, where the Court is of opinion that the infant is not educated in such moral and religious principles as a parent ought to inculcate. (e) This rule, if applied to the case of a foreign infant entrusted by the father to the care of a person resident in this country for the purposes of education, might in many cases wholly remove such infant from the authority and control of the father, although the education bestowed on such infant was not inconsistent with the doctrines and customs of the country where the father was resident, and to which such infant belonged. Let the consequences be considered for a moment. Nothing is so common as for Scotch tutors to send Scotch children, boys or girls, to English schools. Any one might at once make them wards of Chancery, and supersede the Scotch guardians. The chil-

(a) 6 Ves. 363.

(b) 10 Ves. 52.

(c) Jac. 265, n.; Anon.

(d) 2 My. & Cr. 82.

(e) *Wellesley v. Duke of Beaufort*, 2 Russ. 1.

dren would be held to be without guardians. The Master in Chancery would be directed to fix their residence, — which must be always in England, — to lay down a plan for their education and maintenance; and the powers of the parent, and his wishes confided to his dearest friends, whether his nearest relations or not, might be wholly defeated, and the children wholly estranged from Scotland: nay, if the child should be sent only for a week to London for the advice of an eminent surgeon, the same result might follow.

* *The Solicitor-General* and *Mr. Spencer Follett*, for * 73 the respondent. — The order made by the Lord Chancellor was not only right, but the only order that could be properly made. Here was a child of tender age brought to England, and residing there when her mother died; she had no guardian in England; a bill was filed for the purpose of obtaining for her the protection of a guardian, and an application was made to the Court for that purpose, whereupon the Vice-Chancellor made an order appointing guardians. The appellants complained of that order; a contest arose between the parties; the Vice-Chancellor reversed his first order, and made another more erroneous; on appeal therefrom, the Lord Chancellor, after the appellants declined his offer of appointing them jointly with Mr. D. Stuart and Mrs. Buchanan, directed the usual order of reference to the Master, leaving to him to select and approve of proper persons to be guardians. Was not that the usual course? it was in accordance with the practice of the Court from the time of Lord HARDWICKE. *Ex parte Watkins.* (a)

It is objected that the child in this case is domiciled in Scotland, and therefore the Court of Chancery had no jurisdiction. The short answer to that objection is, that it is wholly immaterial to the jurisdiction where her domicile is; she is an infant now residing and intended to reside in England, and the Court of Chancery is bound to extend its protection to her, as it is to all infants who require it, having no parent or guardian residing within the jurisdiction. But if

(a) 2 Ves. Sen. 470.

the domicile is at all material, we are ready to show that it is in England, the domicile of the child following * 74 * that of the mother, the surviving parent, according to the rule laid down by Sir W. GRANT in *Pottinger v. Wightman*, (a) and adopted by the American Judges and jurists, who are entitled to the highest consideration on this and other questions of international law, which constantly arise among the different States of the Union. (b) It is quite clear that this child's mother changed her domicile, having taken so strong a dislike to Scotland that her last prayer was not to be taken to be buried there, and not to have her child taken there for her education. The whole of this contest arises from the refusal of the appellants to comply with the dying request of this lady. Their conduct ever since her return from Madeira in 1836, when she spent about two months in Scotland trying to settle her affairs there, disgusted her with them and with Scotland, as is evident from some of her letters printed in the appendix. (c) Whether she was right or wrong, it is an inevitable conclusion from these letters that she abandoned her Scotch domicile. It is equally clear that when in 1839 she took the house in Albion Street for three years and furnished it, she fixed her domicile there; there was the *animus manendi* joined to the act of fixed residence. This is a stronger proof of change of domicile than existed in some of the cases that have come before this House. *Bruce v. Bruce*. (d) It may be mentioned that in *Warrender v. Warrender* (e) and *Munro v. Munro* (g) the parties had retained their Scotch domicile, and for that * 75 reason this House held that they had * not acquired a new one: but here there is no Scotch domicile; it was abandoned, and all the mother's declarations, and acts also, demonstrate an English domicile. What is domicile but the permanent residence of a party? In *Bruce v. Bruce* it was held that a person who had gone to India, though with an

(a) 3 Meriv. 67.

(b) Story's Conf. of Laws, c. 3.

(c) *Vide ante*, p. 54 *et seq.*

(d) 2 Bos. & P. 229, n.; and 6 Bro. P. C. 566.

(e) *Ante*, Vol. II., p. 488.

(g) Vol. VII., *ante*, p. 842.

intention to return to Scotland, which he called his home, changed his domicile. So in the case of Harmony, (a) before Sir W. Scott, a party having gone to France only for four years without any declaration of intention, was held to be domiciled there.

Although this child is now unquestionably domiciled in England, and to all intents and purposes an English child, yet, supposing she is not so domiciled but merely resident, we submit that in that view also the Lord Chancellor's order was right. Is not every resident in this country, foreign as well as native, entitled to the protection of our laws, which they are all, while here, bound to obey? The fact of an infant being a foreigner and having foreign guardians, does not prevent the exercise of the jurisdiction of the Court of Chancery. *Ex parte Watkins*, (b) *Salles v. Savignon*, (c) *Campbell v. Campbell*. (d)

[LORD CAMPBELL. — Would it not be necessary to make out a case demanding the exercise of the jurisdiction? Why should guardians be appointed, if they are not required for the protection of the child?]

Upon the filing of a bill in the name of an infant, the jurisdiction instantly attaches; the infant is then a ward of Court, and it is mere matter of course for the Court to order the Master to make the necessary inquiries and approve of guardians.

[THE LORD CHANCELLOR. — The moment the bill is * filed, the Court becomes guardian of the infant, be- * 76 fore any inquiry; and the Master, to whom the Court refers the inquiries, is the deputy of the Court. No one can in the mean time take the infant out of the jurisdiction, without leave of the Court.

LORD CAMPBELL. — So, if a boy from a foreign country, where his parents or guardians reside, is sent to this country

(a) 2 Rob. Adm. Rep. 322.

(b) 2 Ves. Sen. 470.

(c) 6 Ves. 572.

(d) *Vide post*, p. 186.

for his education, he may be made a ward of Court by any person filing a bill in his name, alleging falsely that he has property here; and being a ward of Court, he must have guardians appointed by the Court, and cannot return to his own country until he attains his age of twenty-one years. Is there any instance of an appointment of guardians where there is no property within the jurisdiction?]

If a bill is improperly filed, the Court will know how to punish the parties and vindicate its own authority. As to the allegation of property within the jurisdiction, it is quite immaterial; it is not property that gives jurisdiction to the Court, as is very evident from what Lord ELDON says, in his judgment in *Wellesley v. The Duke of Beaufort*. (a) In *De Manneville v. De Manneville*, (b) the child had no property except a reversion, yet the Court exercised the jurisdiction.

[THE LORD CHANCELLOR. — And so of lunatics; the Lord Chancellor has jurisdiction over all, but does not exercise it except where there is property; which seems to agree with what Lord ELDON said in the case referred to. But whether there is or there is not property within the jurisdiction in this case, cannot be ascertained until the hearing of the cause.]

At the time of the filing of this bill, the infant had no * 77 guardians in England; the Scotch tutors were * accounting parties, and they appeared to the bill, and are bound to account to her; but they had no authority over her or her property in this country: their authority was strictly territorial. The authorities on this point are referred to in Dr. Story's *Conf. of Laws*, c. 13, § 504 *et seq.* He cites, among other cases, *Morrell v. Dickey* (c) and *Kraft v. Vickery*, (d) American decisions. In Mr. Burge's work also it is said, "When the minor or lunatic comes within the jurisdiction of a foreign tribunal, he ceases to be subject to that of the tribunal which had previously placed him *sub tutela*, and

(a) 2 Russ. 1; see pp. 20, 21.

(b) 10 Ves. 52.

(c) 1 John. Ch. 153.

(d) 4 Gill & John. 332.

becomes subject to the jurisdiction of the tribunal of the country to which he has resorted." (a) The same doctrine is laid down by Lord ELDON in the case of Houston. (b) The appellants, as testamentary tutors in Scotland, are not testamentary guardians in England within the Statute 12 Ch. 2, c. 24, § 8, for reasons which cannot be better stated than by referring to what Lord COTTENHAM said on that point. (c) It may be further added, that by the Scotch law the power of tutors over a child ceases at the child's age of twelve years; (d) whereas the Statute of Charles continues the power of guardians till the ward attains twenty-one. Then here is a child without a parent or guardian; what can the Court do? It is not sufficient to say there are guardians in Scotland or in France, because after the bill is filed the Court will not allow the child to be taken out of the jurisdiction, except by guardians amenable to the jurisdiction. As to the alleged hardship of preventing the child from visiting her Scotch relations, estates, and tenants, surely that matter may be left to the * judgment and discretion of the Court, which fre- * 78
quently allowed maintenance to infants out of the jurisdiction (*Logan v. Fairlie*, (e) *Jackson v. Hankey*, (g) *Stephens v. James* (h)); never refusing any proper indulgence to its wards, *Campbell v. Mackay*. (i) In *Harwood's Case* it was said that the Court generally attends to the recommendation of the father of even an illegitimate child; and in *Chatteris v. Young*, (k) persons so nominated were appointed guardians. Does not that admit the full jurisdiction of the Court? No case has been or can be produced in which the Court appointed persons residing out of the jurisdiction to be guardians, although recommended and even appointed by the father, as in *Logan v. Fairlie*.

It is material to remember, that after the Vice-Chancellor's first order, the appellants not having then appeared to the bill, another bill of the same kind was filed by the infant

(a) 4 Burge, 1003.

(c) 1 Phill. 32.

(e) Jac. 193.

(h) 1 My. & K. 627.

(k) 1 Jac. & W. 106.

(b) 1 Russ. 312.

(d) *Ante*, p. 53.

(g) Jac. 265, note.

(i) 2 My. & C. 31.

against the trustees of the Glen-Morven estate, one of whom resided near Carlisle, within the jurisdiction. That bill is still on the files of the Court, although no proceeding has been yet taken in it, as the appellants put in their appearance to the bill against them, and, instead of demurring, submitted to the jurisdiction of the Court. The allegation of property belonging to the ward in England was admitted to be unquestionably true in the bill against the Glen-Morven trustees. But whether there is property or not, the Court has jurisdiction to appoint guardians. (a)

• 79 • *Mr. Turner*, in reply. — It is admitted that all infants without parents or guardians in England are entitled to the protection of the laws of England: on the other hand, those laws recognize the laws of foreign countries, and give effect here to their orders. This infant does not want the protection offered; she has guardians already appointed for her protection, as willing to take care of her in England as in Scotland; and the chief objection to the course pursued by the Lord Chancellor is, that while there is no imputation on those gentlemen, the Court of Chancery interferes to deprive them of their office.

[LORD CAMPBELL. — The argument was, that if a foreign child is in this country, the Court of Chancery has a right to interpose its jurisdiction, even though the child has guardians. It is clear there may be cases in which that interposition would be proper.]

It is admitted that such cases may arise. But if this is not a case calling for that extraordinary protection, is it proper to interfere? This child has her guardians selected by her father.

[The Solicitor-General being here asked by the Lords whether he admitted the authority of a foreign father over

(a) Per Lord ELDON, in *Wellesley v. Duke of Beaufort*, 2 Russ. p. 20.

his children in this country, said: Yes; a father's authority according to the laws of England, but no further.]

The *patria potestas* of a foreign parent is recognized by the English law. The authority of these testamentary tutors succeeding to the *patria potestas* should be recognized on the same ground. The cases cited on the other side are not applicable. *Salles v. Savignon* (a) showed that a foreign child without guardians here may be made a ward of Court, and the Court will then exercise its power to punish persons offending against its jurisdiction.

[LORD COTTENHAM. — That is, according to your argument * on that case, the Court may do every thing for * 80 the protection of the infant except appoint guardians.]

In *Ex parte Watkins* (b) there was no question whether the guardian in the Leeward Islands had any authority in this country; but two parties here applied to the Court (by petition, to avoid expense) to determine which of them had a right to the custody of the infant. The Lord Chancellor said, "It is not for me, but for the Master, to decide that question." The case of *Otto Lewis* (c) bears out our proposition that the Courts here recognize the *status* of a party in another country. The American cases of *Morrell v. Dickey* and *Kraft v. Vickery*, cited on the other side, relate to the power of a guardian in one State over the infant's property in another State. In *Mr. Wellesley's Case*, (d) Lord ELDON's order was founded on the father's improper conduct. That case differs in all its circumstances from this. In *Harwood's Case* the Court held that the commitment was right, because the custom of London adhered to the child out of the jurisdiction. (e)

[THE LORD CHANCELLOR. — Suppose this child to have got into improper custody, or into the grandfather's custody, by

(a) 6 Ves. 572.

(b) 2 Ves. Sen. 470.

(c) 1 Ves. Sen. 298.

(d) 2 Russ. 1.

(e) 1 Mod. 79.

what process could the Scotch tutors regain possession of her?]

I apprehend by writ of *habeas corpus*, for which any one may apply.

[LORD CAMPBELL. — As in the late case of the Canadian prisoners. (a)]

[LORD BROUGHAM. — The Court of Queen's Bench, in delivering the child from custody by writ of *habeas corpus*, would tell her she was at liberty to go where she wished. Suppose, then, she chose to go to the grandfather?]

* 81 * Then application might be made to the Court of Chancery on a bill filed by the tutors, as by English guardians.

[THE LORD CHANCELLOR. — And that Court would then appoint persons within the jurisdiction to be guardians.]

That would be an unnecessary interference while there are guardians, the tutors testamentary, whose authority the Court should respect. It is said in Mr. Burge's Commentaries on Colonial and Foreign Laws, in the passages before referred to, (b) that personal laws are of universal extent and operation; that jurists concur in representing as personal laws, those which place minors under the authority of their guardians or tutors; that States, from comity and considerations of mutual interest, recognize and give effect to the laws of each other, where the rights either of their own subjects or of foreigners are derived from or are dependent on those laws; and that, from comity, foreign states recognize and give effect, almost universally, to those laws of the domicile which constitute the *status*, quality, or capacity of the person, and which are called personal. Vattel also says, (c) "It

(a) Watson's Case, 9 Ad. & El. 731; s. c. 1 P. & D. 516.

(b) Vol 1, c. 1, pp. 13, 14, 25.

(c) B. 2, c. 7, §§ 84, 85.

is the province of a nation to exercise justice in all the places under her jurisdiction; that other nations ought to respect this right;” and that, “in consequence of this right of jurisdiction; the decisions made by the Judge of the place within the extent of his power ought to be respected, and to take effect even in foreign countries. For instance, it belongs to the domestic Judge to nominate tutors and guardians for minors and idiots. The law of nations, which has an eye to the common advantage and the good harmony of nations, requires, therefore, that such * nomination of a * 82 tutor or guardian be valid and acknowledged in all countries where the pupil may have any concerns.” And accordingly there are numerous instances in which our Courts recognize and enforce the laws of foreign countries. *Sawyer v. Shute*, (a) *Campbell v. French*, (b) *Dues v. Smith*, (c) *Bladd v. Bamfield*, (d) *Lashley v. Hogg*, (e) *Anstruther v. Adair*. (g) The Courts in Scotland, by the like comity, give effect to the laws of this and other countries. Ersk. Inst. B. 1, tit. 7, § 2. (h) In *Nasmyth v. Nasmyth*, (i) the English guardians of a minor were held sufficiently qualified, without any confirmation, to authorize a suit in Scotland in his name; and in *Johnston v. Clark*, (k) a guardian named in one of the colonies by a father to his natural child was held entitled to take the child from the father’s sister. If the law of England by comity adopts the law of Scotland, there is no doubt that these Scotch tutors are guardians of this child in England, until she attains the age of twelve years. The Court ought to recognize, and, if necessary, confirm them in the office, having regard to the solemn deed of the father, in preference to the unascertained wishes of the mother, — whose rights as a parent, be it observed, were merged in her duty as joint tutor, in which character she must, according to the law of Scotland, have submitted to the majority.

(a) 1 Anstr. 63.

(b) 3 Ves. 323.

(c) Jacob. 544.

(d) 3 Swanst. 603, 604.

(e) Robertson Pers. Succ. 414.

(g) 2 My. & K. 513.

(h) Ivory’s edit., p. 164.

(i) Morr. 4455.

(k) Morr. 16374.

[The learned counsel was proceeding to argue that the interference of the Court of Chancery with the guardianship of the infant, to the exclusion of the Scotch tutors, was an infringement on the rights of the Scotch nation, secured by the Act of Union ; —

• 83 • The Lord Chancellor and Lord CAMPBELL severally observed that he might pass that matter over without prejudice to his case, as they were clearly of opinion that the interference of the Court of Chancery in this matter was not an invasion of the Scotch Courts.

LORD COTTENHAM. — The invasion is not of Scotland by England, but of England by Scotland.]

LORD BROUGHAM. — This being a case of first impression, and having excited great interest in Scotland very naturally, and in this country also, we must take time to consider it.

Lord CAMPBELL agreed that they ought to take time for consideration ; although he had no doubt of the jurisdiction of the Court of Chancery.

The further consideration of the case was then adjourned.

May 16.

Their Lordships finding afterwards that they were equally divided in their opinions on the validity of the order appealed from, ordered the case to be again argued by one counsel on each side, in the presence of other peers. Accordingly, on the 16th of May, Lord LANGDALE and other peers being present, *Mr. Turner* was heard to argue the case for the appellants, and the Solicitor-General for the respondent. The jurisdiction of the Court was, on this occasion, declared by the Lords to be undeniable, and was therefore admitted by *Mr. Turner*, who also admitted that the appellants were not testamentary guardians within the Act 12 Charles 2. The argument was principally applied to the justice and expedi-

ency of admitting the tutors to act as guardians in England. All that was new in the second argument has been incorporated with the above report of the first arguments, except the statement of a case of *Campbell v. Campbell*, * 84 referred to as a case in point, lately decided by Lord COTTENHAM. The circumstances of it are stated by Lord CAMPBELL in his judgment, *infra*, p. 136.

May 26.

THE LORD CHANCELLOR. — This appeal was argued at considerable length some time back, but as your Lordships did not agree in opinion as to the judgment proper to be pronounced, it was argued a second time a few days ago; and I am sorry to say that even now, as the result of the second argument, there is a difference of opinion among your Lordships. I entertain the utmost possible respect and deference for the opinions of those noble Lords who differ from the judgment which I have formed; but I think it my duty to move your Lordships that the order of the Court below be affirmed.

I will state to your Lordships very shortly the grounds upon which I think this ought to be affirmed. A bill was filed in the name of an infant, Mary Stewart Beattie, by her next friend, her grandfather, against the appellants and other defendants. The bill alleged that the defendants were in possession of rents and profits, the produce of the estates of the infant, to a very large amount: it prayed that they might account, in the Court of Chancery, for the sums which they had so received; it prayed also that a maintenance might be appointed for the infant, and that the estates and her person might be placed under the protection of the Court. This was the scope and the object of the bill.

It is proper that I should state, that according to the uniform course of the Court of Chancery, — which I understand to be the law of that Court, which has always been the law of that Court, — upon the institution * of a suit of this description, the plaintiff, the infant, became a ward of the Court, — became such ward by the very fact of the institution

An infant becomes a ward of Court by the filing of a bill in its name.

* 85

of the suit; and being a ward of the Court, it was the duty of the Court to provide for the care and protection of the infant; and as the Court cannot itself personally superintend the infant, it appoints a guardian, who is an officer of the Court, for the purpose of doing that on behalf of the Court, and as the representative of the Court, which the Court cannot do itself personally.¹ If there be a parent living within

If the ward has a parent or testamentary guardian living within the jurisdiction, each of them is subject to the orders of the Court, in the same way as a guardian appointed by the Court. (See also *post*, 118, 119.)

the jurisdiction of the Court, or if there be a testamentary guardian within the jurisdiction of the Court, the Court in that case does not interfere for the purpose of appointing a person to discharge the duty, which is imposed upon the Court itself, of taking care of the person of the infant; but the parent or the testamentary guardian is subject to the orders and control of the Court, precisely in the same way as an officer appointed by the authority of the Court, for the purpose of discharging the duties to which I have referred. I apprehend that is clearly the law of the Court of Chancery; and it has always been so, as far as I have been able to understand and comprehend.

The manner in which this appointment (of guardian) is made, is not without previous inquiry and consideration. The Court directs the Master to inquire who are the proper persons to be entrusted with the care of the infant; and as that custody and care may endure for some time, it is necessary that some inquiry should be made for the purpose of determining how that care should be exercised. That must depend, in some degree, upon the property which the infant possesses; and therefore an inquiry is made as to the property of the infant, and as to what is proper to be

• 86 • allowed for maintenance, and also as to the manner in which the education of the infant shall be conducted.

All these are preliminary inquiries as to matters of fact, for the information of the Court; and when the Master has made his report, the report is taken into consideration by the Court, and the Court acts upon it according to its judgment: it does not necessarily adopt the suggestions of the Master, but it

¹ See *Stuart v. Bute*, 9 H. L. Cas. 440.

uses the materials which are found by him as the ground upon which the judgment proceeds.

Now, the order which is here complained of is merely an order of this description. The Lord Chancellor has directed the Master to inquire who are proper persons to be appointed as guardians of the infant, or, in other words, to approve of persons to be guardians ; to inquire what will be a proper maintenance for the infant, what her property consists of, and what scheme of education should be adopted. I apprehend, therefore, that the order is according to the common rule of the Court, and I really do not precisely understand the grounds upon which it is objected to. I can state some of the objections which have been urged at the bar, but which appear to me to be altogether invalid.

One objection is this : that tutors and curators have been already appointed ; that the young lady being a Scotch child, tutors and curators have been appointed in Scotland by the will of the father. The father is dead, and the mother also is dead ; but the child is here in England. The tutors and curators are domiciled and living in Scotland ; they are out of the jurisdiction of the Court. The Court can exercise no control over them ; cannot make them amenable for any misconduct in the management of the infant ; and I apprehend that in all cases the Court * requires that there * 87 shall be a guardian appointed within the jurisdiction of the Court, responsible to the Court, subject to its jurisdiction and its authority. If there be a parent, residing out of the jurisdiction, the Court interferes, and appoints a guardian within the jurisdiction : if there be a testamentary guardian, residing out of the jurisdiction, the Court appoints a guardian within the jurisdiction : because it must have some person to look to, some person who is the representative of the Court on the spot, responsible to the Court, who shall have the care and management of the infant.

If the parent or testamentary guardian of the ward is residing out of the jurisdiction, the Court appoints a guardian within the jurisdiction.

The tutors and curators, domiciled in Scotland, have no authority in this country ; they cannot control the infant. If the infant chooses to take the protection of any other person,

who may be an improper person, deluded, if you will, by that person, the tutors and curators have no power of themselves to interfere. But they have the power to interfere through the medium of the Court of Chancery. A guardian may be appointed by the authority of the Court of Chancery; and if a complaint is made to that Court by the tutors and the curators, the Court of Chancery will set it right through the medium of the officer whom the Court has appointed. If it is thought desirable that the child should go to Scotland to reside, the tutors and curators have no power to take the child to Scotland, unless the Court, having appointed a guardian, thinks fit, for the benefit of the child, to direct the guardian to hand the child over to the Scotch tutors and curators, in order that it may be carried to Scotland for the purpose of education, or for any other purpose.¹

It seems to have been assumed in the argument in this * 88 case, that because the guardians are appointed by * the

Court of Chancery, therefore the Court of Chancery has decided by this order that the child is to remain in England; that she is to be educated in England; that she is to have her maintenance given in England, and that she is to continue in England up to the time of her attaining the age of twenty-one. But no such consequence

follows. The Court of Chancery may, at any time that it thinks proper, direct the infant to be taken to Scotland, to be educated there, if it considers that it will be for the benefit of the infant. The order does not go to the extent of saying that there is to be no change in the residence of the child: it is subject entirely to the control, to the order, and to the discretion of the Lord Chancellor for the time being.²

It is supposed also that the tutors and curators appointed in Scotland are not to be the guardians of the child, or not to be among the guardians of the child. All that the Court requires is this: that there shall be some person within the jurisdic-

It is always in the discretion of the Lord Chancellor to allow a ward to go out of the jurisdiction. (See also *post*, 106, 107.)

¹ See *Woodworth v. Spring*, 4 Allen, 321; *Nugent v. Vetzera*, L. R. 2 Eq. 704.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1355 and notes; *Nugent v. Vetzera*, L. R. 2 Eq. 704.

tion, and responsible to the Court, performing the duties of guardian. There is nothing in this order inconsistent with the Lord Chancellor ultimately appointing the tutors and curators who reside in Scotland, as guardians, with any other persons who are residing and domiciled in this country, and subject to the jurisdiction of the Court. It does not appear to me, therefore, that any of those objections which have been successively urged at the bar are valid objections to this order. It appears to me to be an order in the common course.

Persons residing out of the jurisdiction may be appointed guardians, jointly with persons residing within the jurisdiction.

But it is said that if this order is to prevail, it will follow that any child of Scotch or other foreign parents, brought to England for the purpose of education, may be made a ward of Chancery, and impounded *at once in this * 89 country. Undoubtedly there may be cases of that description. One may suppose circumstances of such a nature as to render the interference of the Court of Chancery not only proper, but absolutely necessary. Cases may be supposed where the Court of Chancery under such circumstances ought to interfere. But then it is said that fictitious cases may be set up, and that a bill may be filed expressly for that purpose by some concert or contrivance. My Lords, the authority of the Court may, of course, be subject to be abused in this, as in every other instance; but the Court will vindicate its authority, and will not suffer it to be abused: and I know no case in which it has ever been suggested that in this direction any abuse has been committed of the authority of the Court of Chancery. Suppose a bill obviously fictitious for the purpose I have stated were to be filed, the Court would afford an instant remedy. The bill might be referred to the Master, for the purpose of determining whether it was for the interest and benefit of the infant that the suit should be prosecuted; and if the Master should report in the negative, there would be an end of the suit, and the costs would fall upon the party who had so improperly instituted the suit; and as a suit can only be instituted through the medium of a solicitor, the Court would visit the solicitor in a further and much more exemplary manner. It

does not appear to me, therefore, that the objection that the authority may be abused is any valid objection in a case of this description.

It is further suggested that this bill is filed solely for the purpose of making this infant a ward of the Court of Chancery. It may be so. It often happens that bills are filed solely for such purposes ; and it may be a very important object, in which the interest of the infant is deeply concerned. Whether this bill is of that description or not is wholly immaterial. The bill states facts, which bring the case within the jurisdiction of the Court. It states that there are large sums in the hands of the defendants ; it prays for an account ; it prays that the money may be paid into Court ; it prays also for the allowance of a maintenance ; it prays that the child's property may be put under the jurisdiction of the Court.

The defendants, who are in Scotland, have appeared to this bill ; but they have not put in their answers, and the cause is not at issue. We cannot decide the merits of the cause, in this stage of it, upon a motion of this description. Such a course of proceeding was never heard of in the Court of Chancery. The cause is depending ; the de-

If the bill filed to make an infant a ward, states facts, giving the Court jurisdiction, the infant is at once a ward under the protection of the Court, before any proceeding is had in the cause, and before any guardian is appointed.

fendants must put in their answers ; issue must be joined ; all the evidence must be heard, and the cause must be decided as every other cause must be decided. We cannot anticipate the result ; but till the result takes place, the child is a ward of the Court of Chancery. No person can interfere where a child is a ward of the Court of Chancery without calling down upon himself the process of that Court. The appointment of guardians in this respect makes no difference. Whether there be guardians or not, the child is under the immediate control and in the custody of the Court of Chancery. The appointment of guardians in this respect makes no difference. The guardian is only appointed as an officer of the Court, as the mode by which the jurisdiction and authority of the Court is to be exercised. It may happen, indeed, in the result that this bill should be dismissed. It may happen that the plaintiff, the

next friend, may have to pay all the costs. It may happen that in the result the Court * may direct this * 91 infant to be handed over to the tutors and curators in Scotland; but we cannot anticipate what will be the result until the cause comes to an issue,—until the witnesses are examined, and until the cause is decided. Until that takes place, as I said before, the child is absolutely a ward of Court, and cannot be taken out of the jurisdiction of the Court, whether guardians be appointed or not. The appointment of a guardian makes no difference, except as the medium through which the jurisdiction of the Court is exercised; because the Court thinks it better that there should be prevention against violence and misconduct than that it should be afterwards called upon to investigate a charge of violence and misconduct, for the purpose of affording a remedy.

For these reasons, I think this order ought to be sustained. I confess that in the course of the argument I found it very difficult to understand what ground there was for objecting to it, consistently with the course of practice and the uniform authority of the Court of Chancery, with respect to cases of this sort. I must, therefore, under these circumstances, humbly move your Lordships that this order be affirmed.

LORD BROUGHAM.—The facts of this case are few and simple, and I need not recite them. It is my misfortune to have formed a different opinion from that of my noble and learned friend; and I must now state to your Lordships the grounds of the judgment which I am compelled to give in opposition to his.

The appointment of guardians to infants, who are unprotected, appears to arise in all countries from the necessity of the case; and it would be difficult to * point out * 92 any other particular in which the jurisprudence of all countries agrees more generally than in the existence of such a power, usually confided by the Sovereign to the Courts of the realm. The nature of the appointment seems personal, as the object of it is the infant individual's personal protec-

tion. But there is incident to the office also the care of the infant's property; and in some systems of law, as that of Rome and of the countries which adopted the civil law, a distinction is made between the care of the property and that of the person, — curators being given to the former, tutors to the latter.

It is very material to the present question that we should mark the provisions of the Scotch law on this head, — Scotland being beyond all reasonable doubt the domicile of the infant in this case, as it is admitted to have been the place of her birth, and the place where all her property real and personal is situated. By the law of Scotland, the father may appoint a guardian to act after his decease. In default of such appointment or of the appointed guardian's accepting the office, the right of the guardianship by law devolves on the next of kin, called the nearest agnate: a year, *annus deliberandi*, is given this relation to determine whether or not he will accept the office called that of tutor *legitim*, or of law. In case he declines, a guardian is named by the Court of Session, (a) called a tutor *dative*. But so much is the will of the parent and the legal right of the agnate regarded, that if either the tutor testamentary or the tutor of law at any time shall elect to act, the powers and appointment of the tutor *dative* at once cease.

* 93 * The necessity of extraordinary protection to unprotected infants leaves no doubt of the power in the Sovereign, or those to whom he has delegated it, to appoint a guardian, whensoever an infant comes before him or them, and requires protection. The jurisdiction of the Court of Chancery in the present case flows from that source, and is indisputable. And I must be allowed to observe, in passing, that much of the argument and reasons of the authorities urged for the respondent have been pointed to combat a position which is not at all a necessary part of the appellant's

(a) Sitting as the Court of Exchequer, the duties and powers of which were, by the Act 2 Will. 4, c. 54, transferred to a Judge of the Court of Session.

case ; namely, the supposed denial of the Court's jurisdiction. That jurisdiction I hold to be indisputable. But it does not follow that in every case the jurisdiction must be exercised ; that the Court is bound, as a matter of course, always to interfere ; that the nomination of a guardian is of such necessity as to follow immediately from the fact of infancy coming to the Court's knowledge, in the same manner in which the dismissal of a suit for want of prosecution, or signing a decree by consent of all parties on matters that leave no option to the Court. The Court always and in every case has the jurisdiction, but it is not always and in every case a matter of course that it should be exercised : on the contrary, though the right is absolute, its exercise is discretionary ; so that in many cases the exercise of it, I hold, would be a plain miscarriage of the Court, and one that would require correction by the Court of appellate jurisdiction. Thus the Court of Chancery has interfered in preventing the father himself from exercising the *patria potestas* over the child, when the situation and the interests of the child were competently brought before it. (a) But though the right of interference * was generally vested in the * 94 Court, the circumstances authorizing its exercise were matter of discretion in it, and of review by the appellate tribunal. (b) So it may always be a question whether the understood right to appoint a guardian has been wisely and discreetly exercised ; and if the Court of appeal finds that it has not, there is ground for a reversal of the order.

The first question that arises in considering this matter is the degree in which the protection is wanted and the infant left unprotected, because this may be said to be the ground of the jurisdiction ; but most emphatically it is the thing that calls for, and thus justifies, the exercise of it. Now, as there are guardians in this case, appointed by the *lex domicilii*, this leads me to consider what are the powers of a guardian be-

The jurisdiction of the Court of Chancery to appoint guardians to all infants requiring its protection is indisputable ; but the exercise of it is discretionary. (See also *post*, 119, 120.)

(a) *Wellesley v. Duke of Beaufort*, 2 Russ. 1.

(b) *Wellesley v. Duke of Beaufort*, 1 Dow & Cl. 154.

yond the territory in which he is appointed and to which the infant belongs.

Most of the authorities in the general law of Europe seem agreed that the guardian validly appointed in any given country has an authority for the protection of the ward and the administration of his personal estate everywhere, *ex comitate*: and the manifest convenience of this *comitas*, as well as the evident consideration that the appointment is eminently of a personal nature, appears to justify this position. The guardian is a substitute for the parent; and the artificial relation resembling the natural, from which it flows, ought surely to follow the same analogies, and to extend everywhere with the person. Nor would it be easy to assign any reason why the Court of a foreign country, in which the ward might chance to be temporarily resident, should refuse to recognize the tutorial relation, and the powers which it bestows, less than the parental relation and the *patria potestas* belonging to it. If there were, from the nature of the thing, any local peculiarities in the law or the jurisdiction appointing guardians; if that relation was constituted by virtue of any peculiar local policy varying in different countries, there might be some reason for holding that the Courts of one country should not regard the appointment made of guardians in the other. If, for example, in the feudal times, any right of a territorial description belonged to the lord over the infant orphan of his vassal, it would be much less clear that a foreign country should respect the claims of such lord when asserted beyond the limits of the lord's and vassal's country. But where the choice is made either by the natural parent in exercise of his parental power — a power common to all nations — or by the substitution of the next of kin in default of such appointment, or by the authority of the supreme Court to which the parent and infant alike owe allegiance, and which has the sole disposal of the infant's property, then surely nothing can be alleged to show that this choice should not be respected everywhere and in every country in which the infant may accidentally be found for a temporary residence.

There is no difference between the systems of the two countries, no peculiarity in that of Scotland, except that which makes the application of an English jurisdiction much more intolerable; because the law of the infant's domicile gives, as I have shown, a great preference to the guardians of blood and kindred, and confines the authority of the Court within very narrow limits. The only exception to the natural authority, which rests upon principle, is that of the * real estate. It seems reasonable enough that the * 96 power of the foreign-appointed guardian should be confined to the personalty of the infant, in order to exclude his interference with the immovable property, which is more peculiarly subject to the *lex loci* than the movable, which has no *situs*, but follows the person of the owner.

The authority of all, or nearly all, jurists follows these principles. Vattel (a) lays it down generally that the guardian appointed by the Judge of the domicile is guardian wherever the pupil may have any concerns. Hertius says, (b) “*Tutor datus in loco domicilii etiam bona alibi sita administrat;*” but he confines this to personalty. It is to be observed that his *dictum* excludes all necessity of confirmation or new appointment by the foreign Courts, wherein the guardian is to sue or be sued. Matthæus (c) confines the power also to personalty; though others, as Stockmans, (d) make it general. Boullenois (e) is equally strong to this effect; and Merlin (g) expressly says, a guardian sues for debts due to his ward abroad, without any confirmation whatever of his title. Even those who have been cited on the other side, as P. Voet and J. Voet, are, in so far as personal property is concerned, only apparently at variance with the authorities, because they hold all such property to belong to the country of the infant's domicile, and that its disposal is governed by the laws of that domicile. And one thing at least is clear that none of those jurists—not even Dr. Story, who quotes the American laws as not recognizing the authority

(a) B. 2, c. 7, § 85.

(b) 1 Opera de Colli. Leg. § 4, n. 8.

(c) De Auctionibus, L. 1, c. 7, n. 10.

(d) Decis. 125, n. 6.

(e) Obs. 4, p. 51.

(g) Repertoire, p. 412.

in one State of the guardians named in another — have
 * 97 ever thought * of contending that the foreign guardian cannot exercise the personal superintendence of his ward; still less, if less be possible, do they ever contemplate the possibility of any Court appointing guardians for a foreign infant. We may add the authority of what was held in the case of a bankrupt's assignees, in *Hunter v. Potts*, (a) by the Court of King's Bench, and in *Morrison's Case* by this House (in February, 1749), in the instance of a lunatic's committee, as cited in *Sill v. Worswick*, (b) in both of which cases the legally appointed curator in one country was held entitled to act in another.

The Court of Chancery ought to limit its jurisdiction, in the first instance, to an inquiry whether the infant had a guardian already appointed by the law of its own country: and if so, to confirm his appointment.

Now, can it be doubted that these principles, although not sufficient to exclude the jurisdiction of the Court in any given country, would be abundantly sufficient to restrain its exercise; in other words, that they would prescribe to the Court, in which the infant's protection either as to person or property came in question, the sound sense of limiting its inquiry in the first instance to the question whether the infant was unprotected or had a guardian already appointed validly by the Court, or according to the law of the country to which she belonged, and in which her property was situated? If it were found, in the result of this inquiry, that the infant had such guardians, would it not follow that to them the Court should leave the matter, or, at the most, should only appoint them, or rather confirm their appointment, in order to remove every shadow of doubt respecting their title to act? Though even to that interposition there would be a serious objection, as we shall presently see. Such I humbly conceive to be the course which the Court of Chancery in the present
 * 98 instance ought * to have taken; and not having taken it, I hold that there has been a miscarriage, which this Court is required to correct.

Now, observe how manifest is the inconvenience of such a course. The authority of the guardian appointed here may

(a) 4 T. R. 182.

(b) 1 H. Black. 665; see p. 677.

not be wholly nominal and nugatory, but it is at least exceedingly imperfect. The person he may dispose of; the property he cannot touch. Next observe the absurdity of calling upon him to account here, when he cannot by any possibility have any money passing through his hands. He cannot receive a shilling of the ward's estate, except by the good pleasure of the Scotch guardians, who are wholly and irremediably beyond the Court's jurisdiction. Again, mark the consequences of there being an English guardian under the authority of the Court here; he cannot remove the ward out of the jurisdiction, although that ward is only here accidentally; she may have been brought up for her education; she must remain here till she attains majority. The penalty of resorting to our schools is her banishment forth of Scotland; the punishment she would have undergone for theft in her own country. Her frequenting our seminaries entails upon her the same fate to which she would have been subject if bred up at home in a school of thieves; she may have resorted to our milder, our less austere climate, more skilful physicians, more salubrious springs; her health is restored by these doctors and those places, and she is released from their hands and quits those haunts, but only to fall into the hands of the more stern doctors of the law, and to linger in the more pitiless atmosphere of the Master's office; and, restored from sickness to exile, she cannot enjoy in her own home the health which she has regained among us.

The Court * has no choice in this matter; discretion it * 99 does possess as to appointing a guardian and bringing the ward within the scope of its jurisdiction; but once there, it cannot suffer her escape.

In *De Manneville v. De Manneville* (a) an order was made on the father and all others to take no step, and to give security against taking any step, for removing the infant abroad to the father's own domicile, which of course was the child's also. In *Mountstuart v. Mountstuart* (b) the two guardians of a Scotch infant, heir apparent to Scotch honours and estates, differed as to the place where he should be kept;

(a) 10 Ves. 52.

(b) 6 Ves. 863.

and one of them prayed an order for his removal to Scotland, only during the long vacation. But the Court of Chancery refused the application, holding that it had no power to make an order which should suffer the ward to be removed out of its jurisdiction. Nor would it make the least difference upon the argument, if it were made to appear that the Court might possibly in the present day relax the rigour of this rule; because if the law contended for be good for any thing, it was the law also at the time when *Mountstuart v. Mountstuart* and *De Manneville v. De Manneville* were decided; that is, in 1801 and 1805; and therefore it is subject to all the objections which thence can arise. Nor does it materially alter the arguments I am urging, if we admit that, on an application to the Court, the infant would be allowed to go to Scotland; for it is a serious grievance to any of the Queen's subjects to be prevented from going home without application to a Court of Equity. Nor is it any answer to the inference drawn from them, that the Court may hereafter

be applied to for a new rule for allowing the ward to
 * 100 be * removed to her own country, or for handing her over to her Scotch guardians; because the question, and the only question, now before us is the order made and actually subsisting. That order stands or falls by its own merits, and is not to be supported by assuming that a future order may alter, vary, or reverse it; and let it be remembered that it is an order extending over the whole period of the infant's minority; the guardians are appointed until she is twenty-one years of age. The consequences then are as I have described them. Surely we should pause upon a position which leads to such consequences. If this decision be affirmed, who can safely send his infant child to England for any purpose, whether of education or of health? Who can safely bring him across the border when he comes to visit a friend? Every one who honours me with his presence in Westmoreland brings his children at the risk of their never returning to Scotland until they shall have completed their age of twenty-one years. Death may remove the parent, and then the Vice-Chancellor of Lancaster puts forth his long arm, or the Great Seal its longer arm, names guardians, and can no

longer make an order permitting the children's return across the border.

The error which seems to me to have pervaded this judgment arises from the undoubted position that the mere filing of the bill, in which any infant is concerned, makes that infant a ward of Court ; and that then the naming a guardian is of course, because the Court's powers are exercised through a guardian. But this only shows that incidental, and necessarily incidental, to a suit respecting the property or other rights of any infant, is the constitution of the wardship and consequent appointment of the guardian. Why is this such an incident? Because the infant must be represented and protected in the matter * brought before * 101 the Court. But here, let it be carefully kept in mind, there is no such suit ; no *lis pendens* incident to which is the wardship and guardianship. The object and the sole object of the suit is to have a guardian appointed. That is the whole matter ; and therefore all that is wanted of the Court is to make a ward and name a guardian, for no purpose of dealing with any rights in controversy before it, but simply and solely for the appointment's sake. The application is to name a guardian for the sake of naming a guardian. He is to be appointed ; and on the Court asking for what purpose, the answer is, merely that he may be appointed. There are guardians enough already in Scotland willing to act, and much more able to act than any the Court can name, because they can be both curators and tutors ; both manage the property and protect the person. But no ; these are to be disregarded, in order that others may be named with half the authority, and may prevent the ward from returning home.

That the account which I have given of the manner in which the pendency of a suit constitutes any infant a ward of Court is the correct one, appears manifest both from the nature of the thing and from the books of reports. Observe how Lord HARDWICKE deals with the subject, in the well-known case of *Butler v. Freeman*. (a) After showing that the Court's jurisdiction is derived solely from the *patria po-*

(a) Amb. 802.

testas, delegated by the Crown with the Great Seal, he says the Court will even protect an infant against its parent, and *a fortiori* interferes though there be a guardian appointed. In

other cases we have actual examples of such interfer-

* 102 ence, as in *Wilcox v. Drake*, (a) where the * father's insolvency, and in *Smith v. Bate*, (b) where the guar-

dian's insolvency, were held sufficient grounds for interference to protect the infant. But see how that great and discreet Judge defines the limits within which this power shall be exercised, in strict accordance with the argument which I have been holding. "I own," says he, (c) "that there must be a ground to bring the matter properly before the Court; and therefore, if the father be living and no suit instituted here, the Court cannot act in a summary way.

There must be a suit pending, relative to the infant or his estate, to entitle the Court to this jurisdiction." The suit there was relative to an estate, and the bill prayed directions for its management. But there would be an end entirely and at once to this limitation, this qualification, or any thing like it; and the power and its exercise would become absolute and universal, and, of course, if, instead of a suit pending, there was only a bill praying the appointment of a guardian. For the only ground of the jurisdiction, or at least its exercise, being the suit, and the application for a guardian being in vain, according to Lord HARDWICKE, without such suit, the judgment below in this case assumes the very application itself to be suit sufficient, none other being pending. The existence of some suit being the condition precedent of the appointment of guardian, and none having power to apply with effect unless there be such suit, it is said that the application itself supplies the condition and furnishes the ground for the appointment; that is, the application furnishes the ground for itself. The law says, "A. shall not go to Rome

unless some one of the King's subjects shall be allowed

* 103 to go to Rome." A. applies * on the ground that he is one of the King's subjects, and that his going to Rome

(a) Dick. 631; see Jac. 250, n.

(b) Dick. 631.

(c) Amb. 303.

executes the condition precedent. It is as much a reasoning in a circle as can well be imagined ; and I may, moreover, be permitted, with the greatest respect for my noble and learned friend who has preceded me, to say that to insert in his proposition the words “ of this description,” makes his proposition, “ the appointment of a guardian in a suit of this description,” as complete a *petitio principii* as can be conceived.

As for the allegation of property in England, which the bill contains, I can see no difference that this makes in the case ; besides that, it is positively denied and not reaffirmed. Such an allegation could always be made ; and if it were sufficient to entitle a party, not otherwise entitled, to the order prayed, the power of obtaining such an order would be absolute, and the appointment of a guardian would become quite a matter of course. If the argument I have held is of any avail, assuredly it cannot be defeated in this manner by a naked and gratuitous suggestion.

I am therefore of opinion that there has been a miscarriage in this case ; that this House is called upon to reverse the erroneous order ; that the Great Seal had a right to interfere, had a jurisdiction over the question, and that it was called upon to exercise that jurisdiction, and to entertain the question up to a certain point, is quite manifest ; because an allegation, whether by bill or by petition, that the infant, being within the jurisdiction, was not protected, there was a necessity for entertaining the complaint, so far at least as to inquire into the state of the facts, and ascertain whether or not the law and the Courts of the infant's domicile had not sufficiently provided for the guardianship. So in a suit for the restitution of * conjugal rights or jactitation of marriage, and nullity of marriage, our Courts Christian * 104 will entertain the question and inquire into the validity of the alleged marriage, although it is averred in the libel to have been so solemnized in a foreign country. But having opened the door to the inquiry how far by the law of that country the marriage was valid, the English law, to use Sir WILLIAM SCOTT's happy expression in a celebrated case, (a) withdraws

(a) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. Rep. 59.

and leaves the Scotch law to decide the point. So here the Court of Chancery must needs ascertain that guardians have been appointed and duly appointed in the country of the infant's domicile ; and having so found, the Great Seal ought, in my humble judgment, to withdraw and leave the guardian of the domicile in possession of the ward.

If it be said that the Scotch guardian is out of the jurisdiction, and that mischief might have arisen to the ward without a remedy, or that the good intentions of the Court might be defeated by leaving the custody to persons over whom it has no control, — the answer is obvious, and it is satisfactory. The property, at all events, must be left so unprotected in every respect ; over that the Court can have no control. But the Scotch guardians, who have the care of it, may also extend their care to the person, though in England ; nor will they be unaccountable in performing that office. They are accountable to the Scotch Court, and they will be compelled by that Court to do their duty, and visited with punishment for neglecting it, as well touching the person as touching the property. We are not dealing with the natives of

* 105 some barbarous country, which has no * regular tribunals and no system of jurisprudence ; we have to do with the law and the customs and the Courts of a people as civilized as ourselves, and we may safely leave it to the Judges who sit in authority over that people to see that the Scotch guardians do their duty. There is no complaint competent here, no application for superintendence and control, no petition for redress respecting the personal management of the infant, which may not be urged with entire hope of full success in the Courts in Scotland ; and the same law and the same judicature to which we must of absolute necessity leave the whole care of the property, may well be left to take care also of the person, and to dispose of all the questions that may arise in connection with that care.

These arguments I submit respectfully but confidently to your Lordships ; I submit them to my noble and learned friend, whose candour I well know is equal and in proportion to his sagacity ; and I feel assured that if they should have the effect of raising any doubt in his mind, the party and the

law will have the benefit of that doubt. And on the other hand, I am sure that I should at once have retracted the opinion which I had formed, in case what I have heard had impressed a doubt upon my mind.

LORD COTTENHAM.—It has been my fate, in the Court of Chancery and in this House, to hear this case three times argued; and I now have the additional advantage of hearing what has fallen from my noble and learned friend, who has just addressed the House; and but for the difference of opinion which I was aware existed upon this subject among the members of your Lordships' House, I certainly should have * thought it a case which was purely of course, and * 106 this an order which is consistent with every day's practice in the Court of Chancery, and to the pronouncing of which I never in my experience have known any exception. But knowing that this did not strike other noble and learned Lords in the same light, I have thought it my duty very carefully to review the whole of these proceedings from the commencement, and to see whether there is any thing in what has been stated which should induce me to alter the opinion I formed in the first instance.

Before I proceed to state to your Lordships the result of this investigation, there is one point, which seems to have struck my noble and learned friend very forcibly, on which I would wish to make one or two observations; namely, the supposed sort of imprisonment within the large limits of this country, which he seems to have imagined is imposed upon an infant, who has the misfortune, as he would represent, of having guardians appointed by the Court of Chancery in this country. My Lords, there is no such imprisonment; there is no other restraint than the necessity of asking the leave of the Court, before the infant is taken out of the limits of the jurisdiction. If there is any such restraint, any such imprisonment, I certainly never heard of it during the administration of my duties when I had the honour of holding the Great Seal. When an application of that sort was made to me, the only subject upon which, as it occurred to me, I ought to form an opinion, was whether, under all the circumstances, it was for

the interest and benefit of the child that the application should be granted. The misfortune therefore supposed to be inflicted upon the child is, that the mind of the

* 107 Lord Chancellor for * the time being should be exercised upon the question, whether it is for the interest of the child or not that it should be allowed.¹

A case very similar to the present occurred while I was Chancellor. (a) A Scotch child was brought into this country, and the same contest arose. An application was made to appoint a guardian. The Scotch tutor or curator resisted that, and upon the same ground upon which it has been resisted in this case; viz., that the Scotch tutor and curator had authority over the child in England, in opposition to the power of the Great Seal, and to the exclusion of any person to whom the Court of Chancery might think fit to entrust the duty of superintending and taking care of the child. I certainly was not much impressed with the argument; it was very shortly urged, and I believe not very strongly felt by those who urged it. Upon that occasion I formed the same opinion which I did in the present case, that the Scotch tutor and curator had no authority or power whatever in this country, and that the child was therefore entirely without protection here; and that it was a case, therefore, in which it was the bounden duty of the Court of Chancery to appoint an officer of its own to take care of the child. It afterwards occurred that it would be beneficial to the child to go back to the country to which she belonged. An application was made to me: I investigated the whole of the case; I found that the child's friends all resided in Scotland; that she had no connections in England; that there were means furnished for an excellent education for the child in Scotland; and therefore, without doubt or difficulty, I allowed the

* 108 child to be taken back to Scotland, where * I believe she has been ever since. This only shows that the hardship which is supposed to exist by the Court of Chancery taking, as it were, possession of these infants, and depriving

(a) Campbell v. Campbell, *vide infra*, p. 136.

¹ See Stuart v. Bute, 9 H. L. Cas. 440.

them of all the advantages of being brought up amongst their own relations in their own country, has no place whatever, if, under all the circumstances, it appears to be for the interest of the child that the child should be permitted to go back to its own country.

In the present case it is important, before entering upon the consideration of the questions in it, thoroughly to understand the proceedings in the cause, so far as relates to the manner in which those questions have been brought before this House. The infant having been made a ward of Court by the filing of the bill, a petition was presented, praying that the infant's grandfather and great-aunt might be appointed guardians, upon an allegation and affidavits that they were the nearest relations, and that there was no person within the jurisdiction of the Court entitled or empowered to act as guardians; but not stating the appointment of the appellants as tutors and curators in Scotland. The Vice-Chancellor, by the order of the 6th of January, 1841, appointed the grandfather and great-aunt to act as guardians, according to the prayer; which I, on the appeal to me, thought ought not to have been done as a permanent appointment without a previous reference to the Master. A petition was afterwards presented by the Scotch tutors and curators, praying that this order might be discharged; and that, if the Court should think proper to interfere touching the guardianship of the infant, they, the petitioners, might be declared to be, or if not already such, might be appointed, guardians; but that if the Court should not think proper to declare

* or appoint them guardians, then that an order might * 109
be made, by way of reference or otherwise, having due regard to the father's testamentary disposition, to his domicile, and to the circumstances and situation of the property of the infant. The only part of the petition to which the prayer that the petitioners might be declared to be guardians can be referred, is an allegation that the instrument appointing them tutors and curators was in its nature testamentary, and as such, constituted not only a good appointment of tutors and curators according to the law of Scotland, but also constituted a good appointment of guardians according to the law of

England. The same proposition was attempted to be supported by affidavits, and particularly by that of Francis Hart Dyke ; but I do not find any allegation or attempt to prove that tutors and curators appointed according to the law of Scotland are, as such, recognized in this country as guardians, so as to be considered as entitled to the legal custody of infants whilst residing in this country.

Upon this petition the Vice-Chancellor made an order, discharging his former order, and appointing the appellants to act as guardians of the infant during her minority, or until further order ; without prejudice to the question, whether they were entitled to the guardianship under the Statute of Charles 2, c. 24. This order, appointing the appellants to act as guardians, and not declaring them to be so, and reserving only the question as to the claim to be testamentary guardians, would be a decision against their claim to be entitled to the custody of the infant here, as tutors and curators in Scotland, if any such claim had been made before him.

The order would, indeed, be irregular, if the petitioners were entitled to be recognized * as guardians in any character, except as appointed by the Court.

From this order an appeal was brought before me in the Court of Chancery ; and from the report of the case, (a) I find that, although the claim as testamentary guardians was slightly alluded to, no reference whatever was made to the title supposed to exist in Scotch tutors and curators, to be treated in this country as lawful guardians. No such claim having been made before me, I neither formed nor expressed any opinion upon it ; but I held that the Scotch instrument did not appoint the appellants testamentary guardians under the Statute of Charles 2. Having thus decided against the only ground upon which the present appellants claimed a right to the guardianship, I saw that there were but two modes of proceeding upon ; either to appoint them at once as persons selected and preferred, though not legally appointed, by the father, or to make the usual reference to the Master. To appoint the appellants at once would, for the reasons

(a) 1 Phill. 17.

stated by me, as given in the report, have been improper and contrary to the acknowledged practice of the Court. The reference, therefore, became a matter quite of course. It excludes no one, and concludes no question, except the only one argued before me, that the appellants are not testamentary guardians under the Statute of Charles 2,—a decision in which the appellants have acquiesced, not having thought it worth while to raise it again, either in the printed cases, in the reasons assigned for the appeal, or by the argument at the bar; it being always kept in mind, that if the appellants were testamentary guardians under the Statute of Charles 2, it * would be irregular and improper for * 111 the Court to appoint them. Finding, therefore, that the only point upon which I was called upon to decide in the Court of Chancery is not now in dispute, I do not feel that reluctance to take any part in this appeal which I should have felt if the propriety of my decision upon any point raised before me had been called in question; and I have some satisfaction in finding that this is the state of the case, because a new point has now been raised for the first time of great importance, if capable of being supported; and calculated, if supported, very much to cripple the jurisdiction of the Great Seal, and to deprive many infants of the benefit of its protection.

It is contrary to the practice of the Court to appoint guardians to an infant without a previous reference to the Master. (See also *ante*, 85, 86.)

The proposition is, that the law of England recognizes the right and authority of a Scotch tutor and curator, with respect to an infant resident in England; and although it may interfere to aid that authority, or to supersede or control it if improperly exercised, it has no right to take the child under its own care by the appointment of guardians. If that be right, then no doubt the order appealed from is wrong; but so is the order of the Vice-Chancellor of the 19th of March, 1841, sought by this appeal to be established; for that order is as inconsistent with the alleged right of a Scotch tutor and curator as the order appealed from; and yet that order was obtained upon the application of the appellants themselves, attempted to be supported in their resistance to the appeal before me, and now asked to be restored, as would

be the necessary consequence of the success of the present appeal.

The order of the 19th of March, 1841, is not the subject of appeal, and cannot therefore be altered by this House ;
 * 112 but the House, it was argued, might * vary the order of the 17th of April, 1841, so as to correct the order of the 19th of March, 1841 ; but this House can only deal with that order so far as the Lord Chancellor could have dealt with it when the appeal was before him, and he could not have altered it for the benefit of the then respondents and now appellants. He might have refused all, or granted all, or any part of what the then appellant and now respondent asked ; but he could not, upon that proceeding, have declared the Scotch tutors and curators entitled, in this country, to be recognized as guardians of the infant. If this House should be of opinion that such right exists, how could effect be given to that opinion in the present appeal ? Certainly not by discharging the order appealed from, which would re-establish the order of the 19th of March, 1841, which assumes that the appellants have no claim of right, unless they can show that they are testamentary guardians under the Act of Charles 2 ; and certainly not by any variation of that order, which the party appealing from it, the present respondent, did not ask.

The proposition raised at the bar is, however, of such general importance, that it would be much to be lamented if this appeal were to be disposed of without a due consideration of its merits. If the Scotch tutors and curators are entitled to exercise the duties of that office in England, and therefore to be recognized by the Court of Chancery as having lawful right to the care and custody of the infant whilst in this

Essential differences exist between the rights and duties of tutors in Scotland and of guardians in England.

country, it must be considered what are the rights and duties so to be exercised and recognized in this country. Are they those rights and duties which belong to the office of tutors and curators in Scotland, or the rights and duties which belong to guardians in England ? For * they differ in several essential particulars. In Scotland the office determines upon the child attaining the age of twelve

years; in England it continues up to the age of twenty-one: in Scotland, the majority controls the minority; in England, all must concur. If, therefore, the Court of Chancery is bound to recognize the rights and duties of Scotch tutors and curators, as they exist by the law of Scotland, it must take upon itself to administer foreign law; for it is not disputed that the Court has jurisdiction over them if they do not properly execute their duties; that is, their duties according to the law of Scotland. Follow this view to any of its consequences, and the absurdity will be apparent. It cannot be contrary to the duty of a tutor and curator in Scotland to promote the marriage of the infant without the consent of the Court of Chancery in England, or to remove the infant from England to Scotland. Is the Court of Chancery, therefore, to permit such proceedings with respect to an infant, being a ward of Court, because it has tutors and curators in Scotland? Would it be the duty of the Court of Chancery, upon any complaint made, first to imagine in what manner and to what extent the Courts of Scotland would interpose, and to regulate its own interference by that rule? This rule, in the case of a Scotch child, with Scotch tutors and curators, might be ascertained without difficulty or delay; but if such be the rule as to a Scotch child, it must equally apply to all other foreign children; and thus the Court might have to administer the laws of other countries, however remote and uncivilized.

The Court of Chancery, if it recognized foreign tutors, as guardians in England, might, in effect, have to administer foreign laws.

It was urged, that the Court must recognize the authority of a foreign tutor and curator, because it recognizes the authority of the parent of a foreign * child. This * 114 illustration proves directly the reverse; for, although it is true that the parental authority over such a child is recognized, the authority so recognized is only that which exists by the law of England. If, by the law of the country to which the parties belonged, the authority of the father was much more extensive and arbitrary than it is in this country, is it supposed that the father would be permitted here to transgress the power which the law of this country allows? If not, then the law of this country regulates the

authority of the parent of a foreign child living in England, by the laws of England, and not by the laws of the country to which the child belongs. If foreign tutors and curators are to exercise in this country the rights and duties which belong to their office in their own country, more deference would be paid to the authority of their office than to that of a parent. If the rights and duties of foreign tutors and curators of a child in this country are not to be regulated by the law of the country to which the child belongs, what are the rights and duties supposed to belong to them which the Courts of this country are bound to recognize? They cannot as such be treated as testamentary guardians, there being no testamentary appointment under the Act 12 Charles 2, c. 24; or as guardians appointed by the Court of Chancery, there being no such appointment. They cannot be English guardians, without being able to derive their authority from some one of those sources from which the English law considers that the right of guardianship must proceed;

Foreign tutors and curators have not, as such, any rights in this country. and it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognized by the Courts of this country, with reference to a child residing in this country. The

* 115 result is, that such foreign tutor and * curator have no right, as such, in this country;¹ and this so necessarily follows from reason, and from the rules which regulate, in this respect, the practice of the Court of Chancery, that it could not be expected that any authority upon the subject would be found.

It appears, however, that the very case came before Lord HARDWICKE, in *Ex parte Watkins*. (a) A child had had a guardian appointed by the Governor of the Leeward Islands, and, coming to this country, Lord HARDWICKE was applied to to appoint a guardian. The question does not appear to have been contested, but the facts were distinctly stated, and Lord HARDWICKE referred it to the Master to approve of proper persons to be appointed guardians, by the usual order.

(a) 2 Ves. Sen. 470.

¹ See *Woodworth v. Spring*, 4 Allen, 321, 324; *Nugent v. Vetzera*, L. R. 2 Eq. 704.

This is the only case directly in point which has been referred to on either side ; but there are other matters of frequent occurrence which proceed upon the same principle. If a commission of lunacy be in force against a person in Ireland, or in any of the colonies, and that person afterwards come to England, it is a matter of course to take out a new commission in this country, as *In re Houston* ; (a) but why, if the foreign committee has the same authority in this country that he has in his own ? The case *Ex parte Lewis* (b) turned upon a totally different question ; which was, whether the party having been found *non compos* at Hamburg, satisfied the term “lunatic” in the Act 4 Geo. 2, c. 10, so as to give the Lord Chancellor jurisdiction to direct a conveyance ; the words of the Act being, “all persons, being lunatic, or the committees of such persons, shall convey.”

Writers upon the civil and international laws were quoted in this case, as to the comity of nations in * rec- * 116 ognizing rights and duties existing under the laws of other countries. These are well collated and observed upon by Dr. Story, and the result he draws from them is by no means favourable to the argument of the appellants ; but had it been otherwise, the law and practice of this country must decide the question.

If, then, there be no right in this country, in these Scotch tutors and curators as such, what order could have been made in preference to that appealed from ? Ought the application of the child's relations to discharge the Vice-Chancellor's order of the 19th of March, 1841, to have been refused, and that order of the Vice-Chancellor appointing the appellants to act as guardians to have been established ? That is, was it proper, if the tutors and curators had not, as such, any right in this country, to appoint four of the parties named in the instrument appointing them, all being out of the jurisdiction, and therefore to take the child from the care of its nearest relation, without the usual inquiry before the Master ? In *Ex parte Watkins*, Lord HARDWICKE refused to act without inquiry ; in *Logan v. Fairlie* (c) Lord ELDON

(a) 1 Russ. 812.

(b) 1 Ves. Sen. 298.

(c) Jac. 193. .

refused to appoint a person residing in Scotland to be guardian, although the infant appears to have been in that country; and in *Ex parte Ord* (a) he held that the committee of a lunatic going abroad could not continue committee; and the well-known practice of the Court is not to appoint persons guardians who are out of the jurisdiction, unless associated with others who are within it. In *Wellesley v. The Duke of Beaufort*, (b) Lord ELDON appointed another to act as guardian of a child, merely on the ground of the father being abroad. Upon these grounds it would have been

* 117 impossible to have * established the order of the 19th of March, 1841. But independently of that objection, would it have been right, without inquiry, to have given to these four Scotch gentlemen, by the appointment of the Court, the power of guardians of this child?

It appeared from the affidavit that the child was of delicate health and requiring peculiar care; that the mother had been most anxious that the child should continue under the care of its nearest relations in this country; and that a contest had arisen, or had become unavoidable, between those nearest relations and the Scotch tutors and curators, for the care and custody of the child. Such a case would probably have called for inquiry as against testamentary guardians, and certainly required it before disposing of the contest by investing one of the parties to it with the authority of guardian appointed by the Court. Whether the order appointing the appellants guardians should stand, or the usual reference to the Master be directed, was the only question before me in Chancery, and is in fact the only question now before the House. The appellants, who obtained that order of the 19th of March, 1841, and never sought to have it varied, cannot now complain of it or ask the House to vary it. It appointed them guardians, and they were contented to accept the appointment from the Court; and yet they now ask the House to declare — the order standing unappealed from by them — that they are entitled to exercise all the authority of guardians, without and independently of the authority of the Court.

(a) Jac. 94.

(b) 2 Russ. 1.

It has been said that if the Court had jurisdiction, it ought not in this case, in its discretion, to have exercised it. This is not very intelligible to those who are accustomed to the proceedings in Chancery. * It means, I pre- * 118 sume, that the Court ought not to have interfered: but when the order appealed from was made, the question as to interference or non-interference had gone by. The Court had interfered by appointing guardians, and none complained of the fact of interference, but only as to the manner in which it had been conducted. What, upon this doctrine of non-interference, ought to have been the order upon the appeal to the Lord Chancellor? To have refused the application, and thereby to have left the appellants appointed guardians by the interference of the Court; or to have granted what was prayed *simpliciter*, and so to have left the other parties guardians by the interference of the Court; or to require the usual assistance of an inquiry by the Master before deciding upon the future custody of the infant, which was the order made and now appealed from? In truth, however, independently of form, the doctrine of non-interference has no place in the case of an infant, for whose protection no legal right of guardianship in any person in this country exists. The Court being informed that there is no such right of guardianship, supplies the omission as of course, by its own appointment. It is true that in lunacy there is a discretion exercised as to whether the commission should issue, although there may be no doubt as to the lunacy; but there are obvious distinctions between the two cases, one of which is that a commission of lunacy is of itself an evil, although often necessary to prevent greater. This does not apply to the appointment of a guardian to an infant where none already exists, and the application for that purpose is never refused. All infant wards of the Court are under the protection of the Court. If there be a father living, or a guardian regularly appointed, the Court does not interfere, * except to assist the father or guardian, unless * 119 in certain cases in which the misconduct of the father or guardian renders interference necessary for the protection of the child. But if there be no father or guardian regu-

larly appointed, the Court protects the child through the means of its officer, whom it appoints to perform that duty in the character of guardian. If there be no father or other person entitled of right to act as guardian, it is impossible that an order referring it to the Master to make the inquiries necessary to enable the Court to appoint proper persons to act as guardians, can be wrong.

In this case there is no father; and if there was no person entitled as of right to act as guardian, the order was quite of course. That there was no person so entitled as of right to act as guardian, would, I think, be amply established by the consideration before adverted to, if the question were open for consideration; but it is not competent for the appellants to raise that question, the object of this appeal being to establish an order under which they were themselves appointed guardians.

Under these circumstances, the order appealed from was the only order which could have been made; and the grounds upon which the appellants have complained of it are incompetent for them to take, and are untenable upon the merits.

LORD CAMPBELL.—I am of opinion that the order of the Lord Chancellor appealed from should be reversed; that the second order of the Vice-Chancellor should be set aside as well as the first, and that the petition for the appointment of guardians should be dismissed.

* 120 I do not doubt the jurisdiction of the Court of * Chancery on this subject, whether the infant be domiciled in England or not. The Lord Chancellor, representing the Sovereign as *parens patriæ*, has a clear right to interpose the authority of the Court for the protection of the person and property of all infants resident in England, even where testamentary guardians have been appointed, and even where the father is alive and actually himself resident in England. If it be for the benefit of any infant that the Court should appoint guardians, to become officers of the Court, and to take care of the person and property of the infant under the superintendence and control of the Court, there can be no doubt of the power of the Court to do so. Although this

jurisdiction was probably very rarely exercised till the abolition of wardship with the military tenures, and the great increase of personal property in modern times, I have no doubt that it existed at common law. Upon a strict examination, it would probably be found that the care of idiots and lunatics even belongs to the Lord Chancellor at common law; although, as by the Act 17 Ed. 2, c. 10, the profits of their lands and tenements are given to the Crown, and become a branch of the royal revenue, there is now a deputation to the Lord Chancellor respecting them, signed by the Sovereign, and countersigned by the Lord High Treasurer or Lords Commissioners of the Treasury.

Upon an appeal against any order of the Court of Chancery for the appointment of guardians to an infant, the only question is whether the jurisdiction of the Court has been properly exercised; and the criterion is, whether it was for the benefit of the infant. Notwithstanding what has been said by my noble and learned friend who last addressed your Lordships, I can see no difficulty whatever in a Court of appeal admitting * that the Court below has jurisdiction * 121 to interfere and to appoint guardians, and yet going on to inquire whether there was a due occasion for the interference of the Court, and whether its jurisdiction has been properly exercised. The Court of Chancery having a clear jurisdiction to grant an injunction or to appoint a receiver; upon an appeal from that Court, we might surely inquire whether a proper case has been made out for granting an injunction, or appointing a receiver; and if we thought there was not, without questioning the jurisdiction of the Court, we should be bound to reverse the order which the Court had improperly made.

Let us inquire whether in this case the Court was called upon to interfere and to appoint guardians. To justify the appointment of guardians, it cannot be enough to show that there is an infant having a temporary residence in England, placed here by the authority and under the superintendence of its father resident abroad, and judiciously and tenderly cared for by persons appointed by him for that purpose, the person of the infant requiring no care from the Court of

Chancery, and the infant having no property in this country. If the father of such an infant be alive, the Court would not appoint guardians to it. Can it make any difference whether the child is so resident in England by the authority and under the superintendence of its father, or of tutors or guardians appointed by the deceased father, and confirmed by the legal tribunals of the country in which he was domiciled at the time of his death, and in which all the property of the infant is situated? Is it possible to lay down this proposition, that the Court of Chancery, whenever applied to, is bound to appoint guardians to an infant resident in England for

* 122 a temporary purpose, *if its father be dead? The mere death of a father of an infant domiciled abroad, and resident here for health or education or amusement, with the consent of those in whom the parental power is vested by the law of the country of its domicile, cannot necessarily require the expensive and useless and inconvenient process of the appointment of guardians by the Lord Chancellor. It would be ridiculous to suppose that such an appointment must invariably and inflexibly be made, without considering whether the personal safety or personal interests of the infant require the interference of the Court, — although the infant has no property to be protected, and although the appointment would manifestly be injurious to the infant itself, as well as perplexing, annoying, and detrimental to its foreign guardians. The benefit of the infant, which is the foundation of the jurisdiction, must be the test of its right exercise.

Next, let us attend to the facts of this case, which were regularly before the Lord Chancellor when the order appealed against was made. In October, 1835, Thomas Beattie, domiciled in Scotland, having landed estates in that country, and married to a Scotch woman, by whom he had an only child, then just born in Scotland, executed a deed according to the law of that country, by which he appointed the appellants and his wife tutors and curators of the child; whereby they were entitled, upon his death, to the custody and care of the person of his child till she was twelve years old, and to the management of all her property, under the superintendence of the Court of Session, till she was twenty-one. He then

went with his wife and child to Madeira for the recovery of his health, and died there in April, 1836. (His Lordship having then stated the facts *ut ante*, p. 45 *et seq.*, proceeded.)

* The appellants had accepted the office of tutors * 123 and curators on the death of the child's father, and had been confirmed in that office by the Court of Session. According to the law of Scotland they cannot renounce the office after they have accepted it, and they are bound to act under the superintendence of the Court of Scotland, and to account annually for all the property of the infant coming into their hands,—that Court laying down certain rules as to the proportion of the annual income which may be applied to the maintenance and education of the ward. From the death of the father they managed all the infant's property according to the course of the Court, and they concurred with the mother in the care of the infant, consenting to her living with the mother at Chester and in Albion Street, where a suitable establishment was kept up for the infant's comfort and education.

The mother died in December, 1840, and on the 6th of January, 1841, Mr. Duncan Stewart, without any complaint against the tutors, filed a bill, in the name of the infant, against them and other persons, the executors of Mrs. Beattie. The bill imputed no misconduct whatever to the tutors, but merely alleged that they lived out of the jurisdiction of the Court, and that there was no person in this country entitled to act as the guardian of the infant, or to receive the rents and profits of her estates, or to apply the same for her maintenance and benefit. It contained an allegation, not supported by affidavit, that the mother's executors had in their hands some part of the rents and profits received in the mother's lifetime; but in reality it was shown by affidavits that the infant had no property within the jurisdiction of the Court beyond her wearing apparel. The prayer was that Mr. Duncan Stewart, her grandfather, and Mrs. Buchanan, * her grand-aunt, might be appointed her guar- * 124 dians, and that proper directions might be given by the Court for her maintenance and education; and that an ac-

count might be taken, under the directions of the Court, of all the rents and profits of the estates, and of all moneys received by the tutors on her behalf, since her father's death. On the same day a petition was presented by Mr. Duncan Stewart, in the name of the infant, stating the same facts, and praying for the appointment of himself and Mrs. Buchanan as guardians; and then, on an *ex parte* application, the Vice-Chancellor appointed them to act as guardians, and referred it to the Master to inquire and state the infant's age and her fortune, and what would be a proper allowance for her maintenance and education.

The appellants then appeared to the bill, and presented a petition, stating their appointment by the law of Scotland, where the child was domiciled, the prudent arrangements they had made for the comfort of the child on the mother's death; that they had in all respects faithfully done their duty as tutors and curators, and that the infant had no property within the jurisdiction of the Court of Chancery. They submitted that the institution of the suit, and the proceedings for obtaining the order for the appointment of guardians, were unnecessary and improper, and they therefore prayed that the order might be discharged; but added a prayer that, if the Court thought fit to interfere, they might be appointed guardians of the infant. This petition was fully supported by affidavits.

The matter again coming before the Vice-Chancellor, he very properly reversed his first order, and I think he ought to have dismissed the first petition; but, instead of this, he made an order appointing the four appellants to act as guar-
 * 125 dians of the infant * during her minority, or until the further order of the Court, without prejudice to the question whether the appellants were entitled to the guardianship of the infant under the Stat. 12 Chas. 2, c. 24, and without any further direction. Then came the appeal by Mr. Duncan Stewart to the Lord Chancellor, when the order now appealed against was pronounced, whereby the second order of the Vice-Chancellor was reversed, except in so far as it reversed the first; and it was ordered, according to the common form where guardians are ordered to be appointed to an

infant that has none, "that it be referred to the Master to approve," &c.

If this order is to stand, guardians must be appointed as officers of the Court of Chancery; and when appointed they would have all the rights and powers of guardians, and would be entitled, under the superintendence of the Court, to the care of the infant and the management of all her property, until she attained the age of twenty-one. The guardians so to be appointed are not in the nature of guardians *ad litem*, to attend to the suit or the interests which it involves; but general guardians, for the care and management of the person and property of the infant during minority. Now, I am humbly of opinion that this order, so absolutely requiring the appointment of guardians to this infant, as officers of the Court of Chancery, superseding, as far as that Court can, the functions of the tutors appointed by her father and confirmed by the Court of Session, and directing that the infant and all her property shall be under the care and management of the Court of Chancery during her minority, ought not to be supported; that the utmost that could properly have been asked would have been to direct inquiry whether it would be for the benefit of the infant that any English guardian should be appointed, *but that there was no case *126 made even for directing such an inquiry; and that, both orders of the Vice-Chancellor having been reversed, the petition ought to have been dismissed. My noble and learned friend is reported to have said: "With respect to the first application to the Vice-Chancellor, I think it was a very improper one, because there seems to have been nothing whatever in the situation of the infant to justify such an application." (a) I most heartily concur in that observation. There appears to me to have been nothing in the situation of the infant which required the appointment of guardians by the Court of Chancery on the 6th of January, 1841; and I think there was as little on the 17th of April, 1841, the date of the order now appealed against.

When the case was argued before Lord COTTENHAM, it

(a) 1 Phillips, 81.

would appear that the only points discussed at the bar were the regularity of the second order of the Vice-Chancellor, without a previous inquiry by the Master whether the tutors were to be considered testamentary guardians under the Act of 12 Chas. 2, c. 24; and whether, the Court exercising the power of appointment, the tutors named by the father were not entitled to be preferred. I cannot help thinking that, if the counsel for the tutors, instead of relying on their preferable right, and trying in vain to support their appointment as English guardians without any reference to the Master, had insisted that no case was made out for the interference of the Court, and that the appointment of guardians would be prejudicial to the infant, the petition would then have been dismissed. The second order of the Vice-Chancellor could not

stand; for it is a well-settled and a very reasonable
 * 127 rule of practice, that before the appointment * of guardians, there must be a reference to the Master to in-

quire who are fittest to be appointed. That order being set aside, and there being no sufficient ground for contending that the tutors were to be treated as testamentary guardians, Lord COTTENHAM properly disposed of the questions argued before him. But I humbly apprehend that, instead of proceeding to make an order by which guardians were to be appointed, and the person and property of the young lady were to be under the care and management of the Court of Chancery till she reached twenty-one, and by which she was not to be allowed to marry or to go out of the jurisdiction of the Court without the leave of the Lord Chancellor, he ought to have said that, under the circumstances, neither the care of her person nor the management of her property required his interference, and therefore that the petition for the appointment of guardians should be dismissed. He surely must have had the power to do so, although there was no appeal by the tutors against the second order, and they were willing to acquiesce in it. When it was set aside at the instance of the other party, the Lord Chancellor had a right to consider what was the fit order to be substituted for it, and to look to the petition presented by the tutors, in which they submitted that there was no occasion for the appointment of guardians;

and the petition for the appointment of guardians ought then to have been dismissed, if it ought to have been dismissed by the Vice-Chancellor.

I will now consider the grounds on which it was insisted at this bar, that the order of the Lord Chancellor ought to be affirmed. One of the learned counsel for the respondents, justly feeling that the principle for which he contended necessarily carried * him so far, manfully * 128 argued that in every case where there is an infant resident in England, though domiciled out of England and having no property in England, the Court of Chancery, on an application for that purpose by any one, is bound to appoint guardians to the infant; so that boys and girls cannot be sent from Scotland or any foreign country to an English school, or to take advantage of the milder climate of England, or to have the benefit of medical advice in England, without being liable to be made wards of Chancery, and prevented from returning to their native land till they attain the age of twenty-one, being educated and disposed of in marriage under the superintendence of the English Court of Chancery! To show the rigorous superintendence very laudably exercised by the Court over its wards, I may here mention the case of *Jeffreys v. Vanteswarstwarth*, (a) where female infants, having arrived at years of discretion, and having property and relations at Dantzic, were allowed to go to that city only on their guardians entering into recognizance that they should return within a certain period, and should not marry without leave of the Court. I presume there is to be reciprocity on this subject; and that, if English children go to Scotland for education or health, or to see the wild scenery of that country, tutors dative may be appointed to them by the Court of Session, (b) and they may be detained and educated in that cold and Presbyterian country. *Pari ratione*, if they are making a tour in Italy or Spain, they may be laid hold of by the tribunals there established to take care of infants, and for the supposed good of their souls brought up in the true Roman Catholic faith.

(a) Barnardiston, 144.

(b) *Vide n., ante*, p. 92.

The mere statement of such propositions renders any refutation of them unnecessary.

* 129 * In this case a bill has been filed, alleging that the infant has some property in England by the receipt here of some part of the rents and profits of her Scotch estates, so that she is *eo ipso* a ward of the Court; and, being a ward of the Court, guardians must be appointed to her. But the bill is avowedly filed for the sole purpose of the appointment of guardians, to change the custody of the infant; and the allegation in the bill and petition, as to property in England, is unsupported by affidavit; and is proved to be false; therefore if such a bill, which may be filed by any one, is of itself sufficient to impose the obligation of appointing guardians, we come back to the absurd proposition, that the Court is bound to appoint guardians to any foreign infant brought into England, for whatever purpose and for however short a time. The filing of the bill can impose no necessary obligation to appoint guardians, although thereby, in some sense, the infant immediately becomes a ward of Court; for the same consequence follows wherever a bill is filed relative to the estate or person of an infant, or for the administration of property in which the infant is alleged to be interested, although the child be under the immediate tutelage of the father, or under the care of a statutory or common-law guardian, or of a guardian appointed by the Court; or the infant be resident abroad. The position will not hold good that a guardian must be appointed to every infant so made a ward of Court, as an infant may be made a ward of Court as well during the father's life as after his death, and as well where there are testamentary guardians as where there are none. The filing of the bill entitles the infant to all necessary protection from the Court, but does not compel the Court

* 130 to interfere in a manner which * would be injurious to the infant. It is quite clear that in this case the appointment cannot be justified in respect of any property of the infant within the jurisdiction of the Court, and can only be justified with a view to the care of the person.

On the second argument of the case at this bar, the respondent's counsel attempted to rely on another bill, said to have

been filed in the Court of Chancery, in the name of the infant, against the trustees of the Glen-Morven estate, one of the entailed estates belonging to the infant in Scotland: but I am clearly of opinion that the attempt entirely fails. The order is not made in that suit; and the only account we have of it, and the only reference to it in the proceedings, is in the affidavit of Mr. Duncan Stewart, made on the 26th of February, merely stating that a bill had been filed against these trustees for an account of their receipts in respect of the Glen-Morven estate, and to have the same secured or otherwise applied for the benefit of the infant, under the direction of the Court of Chancery. We are not told when the bill was filed or where the trustees reside, or what has been done under it; and it is clearly part of the machinery by which Mr. Duncan Stewart seeks to obtain the custody, care, and education of the infant, in place of the tutors. But how does this bill, respecting the rents and profits of the Glen-Morven estate, show any property belonging to the infant within the jurisdiction of the Court of Chancery?

If the care of the person of the infant required the appointment of guardians, the Court might undoubtedly interpose for that purpose, irrespective of any considerations of property; and it is said that she is to be taken as wholly unprotected, because, according to the authorities, the tutors appointed by the law of Scotland can in no degree and for no purpose be * recognized in England. I must first observe * 131 that this would be a very inconvenient doctrine, and would lead to the general necessity of appointing guardians for all foreign infants found in England who have lost their fathers. I suppose it is admitted that the existence and power of the father, although he be resident abroad, would be recognized by the Court of Chancery; although it is said that the existence and authority of tutors or guardians appointed by the law of the country in which the child is domiciled would not be so recognized. But after a diligent attention to all the cases cited, and all the writers referred to on this subject, I can find no authority for this distinction. The foreign jurists are very much divided as to the extent to which a guardian to an infant appointed in one country shall

be recognized in another. Boullenois, (a) Merlin, (b) Vattel, (c) Huberus, (d) and Hertius, (e) all expressly lay down that the guardian duly appointed by the law of the country where the infant is domiciled, is in every other country to have the same powers, and is entitled to assert any claims over the movable property of his ward; and to sue for debts due to his ward in foreign countries, without having any confirmation of the guardianship by the local authorities, although the power over immovable property belonging to the ward must entirely depend on the *lex loci rei sitæ*. On the other hand, Paul Voet (g) and other jurists deny that the appointment of guardians has an extra-territorial authority, so as to entitle the foreign guardian *virtute officii* to exercise

* 132 * any rights, powers, or functions over the property of his ward, situated in a different State from that in which he was appointed guardian; and such appears from Dr. Story (h) to be the law in the different States forming the American Union. But in none of these writers is there the least intimation of opinion that the foreign guardian, whether he may assert a right of property and sue in his own name or not, will not be recognized so far as the care of the person of the infant is concerned, or that foreign tribunals will appoint new guardians superseding those appointed by the law of the country where the infant is domiciled, because the infant happens for a temporary purpose to be within the territory over which those tribunals exercise jurisdiction; and I cannot help thinking that Professor Story, whose authority has been relied upon by the respondents, would be very much startled at the idea of the Court at New York appointing guardians to an infant domiciled in Kentucky, and having no property out of that State, because the infant had been sent to school at New York by guardians regularly appointed by the proper Court

(a) Obs. 4, p. 51.

(b) Rep. Absens. c. 3, art. 3, § 2, n. 2.

(c) B. 2, c. 7, § 85.

(d) De Conflictu Legum, B. 1, c. 3, § 2.

(e) Opera de Colli. Leg. § 4.

(g) De Stat. § 4, c. 2.

(h) Confl. of Laws, c. 13, § 504 a.

in Kentucky. Indeed I know that the present analogous appointment has created great astonishment among jurists out of England, and is not considered in harmony with the enlightened principles on which the law is generally administered in this country.

Reference has been made to several cases to be found in our own reports; but I think none of them will be found at all to support the order appealed against, or to throw much light on the subject. It is said to have been the opinion of this House, in *Morrison's Case* (cited in * 133 1 H. Black. 677, 682), that an English guardian has authority to institute a suit for the personal property of his ward in Scotland, upon the ground that the administration of his personal estate, granted by the law of his place of domicile, must be taken to be everywhere of equal force with a voluntary assignment by himself. But we have no authentic report of the decision; and as it does not seem to have been acted upon either in England or in Scotland, I do not think that any reliance can be placed upon it. However, the case *Ex parte Lewis (a)* is a direct authority to show that for some purposes the Courts of this country will recognize a curator or guardian appointed by a foreign tribunal. That was a petition grounded on the Statute 4 Geo. 2, c. 10, that a lunatic heir of a mortgagee might be directed to convey to the mortgagor; the words of the Act being, "that all persons, being lunatic, or the committees of such persons, shall convey." There had been no commission in this country, but there having been a proceeding before a proper jurisdiction, the senate of Hamburg, where he resided, upon which he was found *non compos*, and a curator or guardian appointed for him and his affairs, — Lord HARDWICKE said he would take notice of that appointment, and ordered that, on payment of the mortgage-money, there should be a conveyance to the mortgagor. In *Ex parte Watkins (b)* it is said that the Governor of the Leeward Islands had appointed guardians, but that failed as soon as the infant came to England; so that another guardian was to be appointed, and

(a) 1 Ves. Sen. 208.

(b) 2 Ves. Sen. 470.

there was a reference to the Master for that purpose. But we are not in the slightest degree informed what was

* 134 the nature of that * appointment; and the infant may have been domiciled in England, and might have had property in England and nowhere else. Reliance has been placed upon *Houstoun's Case*, (a) showing that where a person has been found a lunatic in Jamaica, and is brought to England by one of his committees, a commission of lunacy ought to issue against him here; and there is no doubt that a committee of a lunatic, under a commission in Ireland, will not be allowed to deal with the property of the lunatic in England, until there has been a commission of lunacy in England and he is appointed committee in England; but this is indispensably necessary for the proper management of the property of the lunatic in England, for the Court in Jamaica or in Ireland, appointing the committee, could exercise no control over him in respect of the property in England; and the Court of Chancery in England could not do so until, being appointed under an English commission, he becomes amenable to that Court.

The only other authority cited in the first argument, on this part of the subject, was *Salles v. Savignon*, (b) which, if accurately reported, although it does not bear very closely upon the recognition of a foreign guardian, would go to show that the Lord Chancellor may make all infants, in all parts of the world, wards of Chancery; and may at any time treat any person who may afterwards come within his jurisdiction, having had dealings with an infant so made a ward while abroad, answerable for what was done out of the limits of his jurisdiction. According to the report of that case, a gentleman and a young lady, natives of the island of

* 135 Martinique, domiciled there, aliens * and French subjects, happened to be in England; the young lady had property in Martinique, and none in England. The gentleman wishing to marry her, wrote to her mother, who was her guardian, in Martinique, offering any settlement that might be approved. They then went to Scotland, and were mar-

(a) 1 Russ. 312.

(b) 6 Ves. 572.

ried there. After they had left England, and on the very day on which they were married in Scotland, a bill was filed to make her a ward of Chancery. They afterwards returned to England, probably on their way to Martinique, and the gentleman was proceeded against for a contempt in marrying a ward of Chancery. In the language of the report, the Lord Chancellor expressed some displeasure at the husband's not attending upon the first notice, but, observing that being a foreigner might be some excuse, would not commit him, but ordered him to attend from time to time, and forthwith to lay a proposal before the Master. I have a most sincere respect for the Court of Chancery, and for the long line of most distinguished Judges who have presided over it; but if such proceedings are sanctioned by this House, there may be some danger that Chancellors, in their zeal to extend to mankind the benefits of their jurisdiction, may think, as high functionaries entrusted with spiritual jurisdiction have thought, that there can be no limit to their power, and that the exercise of it must always be beneficial for those over whom it is exercised, although present pain and suffering may be the consequence. My noble and learned friend said that no case had ever occurred in which there had been a complaint of an excessive jurisdiction on the part of the Lord Chancellor, with respect to the jurisdiction of the Court of Chancery. It is possible he may approve of what was done in this case, but I beg to put this question

* with great respect,—on what sound principle of * 136 jurisprudence can the interference of the Court, in the case I have last referred to, be justified? The parties were in the same situation as if the marriage had taken place in France or in China; and it is utterly impossible to say that the foreign gentleman by marrying a foreign lady in a foreign country, before any step had been taken to make her a ward of Chancery, was guilty of any contempt of the Court, actual or constructive.

After the first argument at the bar in this case was closed, and after I had written these observations, there was communicated to me the note of a case not in print, which has been referred to by my noble and learned friend who last ad-

addressed the House, — *Campbell v. Campbell*, before Lord COTTENHAM, — which is supposed to show that the present order is in conformity with the established practice of the Court of Chancery. According to that note, a female infant domiciled in Scotland happened to be in London, in the care of a tutor and curator appointed by the law of Scotland, likewise domiciled in Scotland, and then in London. The young lady had recovered a very large sum of money (I believe 17,000*l.*) from a noble marquis, for a breach of promise of marriage. The agent of the noble marquis having the money in his hands to pay over to her, filed a bill in the Court of Chancery in her name, against himself, and paid the money into Court. The note states that the money was paid into Court before the application ; but at all events there was, within the jurisdiction of the Court, a sum of 17,000*l.* belonging to the infant ; and it was in respect of that sum belonging to the infant, within the jurisdiction of the Court, that the bill was filed. Thereupon an application was made to Lord

* 137 COTTENHAM, * then Chancellor, to appoint a guardian to the infant, and a guardian was appointed. Now this was probably a very proper order, although I see no reason to suppose, as has been done, that it was this order which secured the 17,000*l.* to the infant. But in that case there was property of large amount belonging to the infant actually paid into Court ; and it does not appear that she had any property out of the jurisdiction of the Court. How can that be a precedent for a case like the present, where the infant has large property beyond the jurisdiction of the Court, and none within it ? Is it supposed that if the young lady had been in London for a temporary purpose, under the judicious care of her Scotch guardian, without any property in England, Lord COTTENHAM would have made an order for the appointment of English guardians ? I can only say that, in my opinion, such an order would have been extremely preposterous, and that on appeal to this House it ought to have been set aside. If there be any practice in the Court of Chancery to sanction such an order, it is full time that the practice should be reformed, for I think it is entirely contrary to principle, to expediency, and to common-sense.

On the second argument in this case, to show the power of the Court of Chancery in the appointment of guardians, reference was made to the case of *Stephens v. James*, (a) where guardians were appointed by Lord Chancellor BROUGHAM to an infant who had been carried to America before the bill was filed making her a ward of Court. I think that was a very proper exercise of the power of the Court, for there was large property within the jurisdiction of the Court to be managed for the benefit of the infant; * but if it * 138 was meant as an authority to show that wherever an infant is made a ward of Court, guardians must as a matter of course be appointed, it may be used to show that the Court of Chancery may appoint guardians for all foreign infants all over the world; for any foreign infant resident abroad may be made a ward of Chancery, by filing a bill containing a false allegation of property within the jurisdiction of the Court.

But it is said that, in the present case, the order is to be supported on the ground that the infant was domiciled in England. I think it is extremely doubtful whether her domicile had been changed; and at any rate an English domicile, if acquired, would not render the appointment of guardians by the Court of Chancery less unnecessary or less detrimental. She was undoubtedly domiciled in Scotland at the time of her father's death. I think that the case of *Pottinger v. Wightman* (b) must be taken conclusively to have settled the general doctrine, that if after the death of the father an infant lives with her mother, and the mother acquires a new domicile, it is communicated to the infant.¹ But in this case the mother's Scotch domicile continued till she acquired another, and I find great difficulty in fixing any time when it can be said that she had acquired a new domicile.

It must be remembered that all her own property, as well as the child's, was situate in Scotland; that she went to reside there on her husband's death; that she came to England only on account of her health, and her child's; that all the

(a) 1 My. & K. 627.

(b) 3 Meriv. 67.

¹ 2 Kent, 227, note (b); 430, note (f); 5 Met. Supp. 589, 590; Story, Conf. Laws, § 46.

tutors appointed by her husband resided in Scotland ; and that there can be no doubt her daughter would return to occupy the mansion of her ancestors. I see no reason to
 * 139 think that, * in case she should recover her health and her daughter should be brought back to Scotland, she had permanently adopted England as her place of residence, although her father resided at Chester. She undoubtedly expected to die in England, and she gave directions that her body should be buried in England : but this was in her last sickness, of the fatal termination of which she had a foreboding. The question is, whether she had taken up her permanent residence in England in case she should recover her health and strength ? If, instead of remaining in Albion Street, Hyde Park, she had gone for her health to the island of Madeira, where her husband died, and had written letters stating that she should die there, and had given directions that she should be buried there, although she had died and been buried there, unquestionably her Scotch domicile never would have been superseded.¹

I likewise think there is considerable weight in the argument that the general doctrine, that the domicile of an infant follows that of the mother who survives the father, may admit of an exception, where the infant is residing with the mother in a foreign country, by authority of a tribunal of the country of domicile, or of those who by the law of that country have a right to determine the residence of the infant, and where there is a certainty that the infant will be brought back to the country of original domicile. If an English nobleman were to marry a Frenchwoman, and to die leaving an infant daughter and heir, made a ward of the Court of Chancery, and the Chancellor were to give leave that she should reside with her mother in France, on security being given that she should be brought back within the jurisdiction when required ; although
 the mother should clearly acquire a domicile in France,
 * 140 and the child should die there, * I do not believe that

¹ See *Moorhouse v. Lord*, 10 H. L. Cas. 285; *Hoskins v. Matthews*, 8 De G., M. & G. 13; *Still v. Woodville*, 38 Miss. 646; *Hegeman v. Fox*, 1 Redf. (N. Y. Sur.) 297; 31 Barb. 480, 481-484; *Stanley v. Bernes*, 3 Hagg. 373.

the Courts of this country would hold that the succession to her personal property would be regulated by the Code Napoleon, instead of the Statute of Distributions. She might be considered as in the care of the Court, rather than of her mother. So, if it were necessary to decide the question of domicile in the present case, there might be strong grounds for contending that the infant while in England was in the care of the tutors, and so has never lost her domicile of origin. But however this may be, I am clearly of opinion that, if the order would have been improper had that domicile remained, it was equally improper on the supposition that an English domicile had been acquired. The question would still be, is the appointment of guardians wanted? and will it be for the benefit of the infant? Where there is personal property to a considerable amount within the jurisdiction of the Court, not exposed to any risk, and about which there is no dispute, domicile may be material for guiding the discretion of the Chancellor, whether he should interfere for its due management; but in this case Lord COTTENHAM considered the domicile immaterial, and so far I agree with him.

Then it is urged, that the appointment of the tutors was not meant by the father to have any operation beyond the territory of Scotland. To this objection Lord COTTENHAM appears to have given considerable weight, and here I feel bound to differ from him. I do not think that it was intended, or that it can operate as an appointment of guardians in England, under the English Statute 12 Charles 2; but I cannot doubt the intention of the father, by the appointment, that the infant should remain under the care and superintendence of the tutors, not only in Scotland, * but in * 141 any country into which, for her health or education, it might be necessary to send her. Can it be supposed to have been his intention, that if she were permitted to pay a visit to her grandfather at Chester, their power over her was to be for ever gone; that she was thenceforth to become a ward of the Court of Chancery; that a reference was to take place to a Master in Chancery for a scheme for her education and maintenance; that she should not be permitted to marry without the consent of the Lord Chancellor; and that she

should not be at liberty to revisit her own country without his permission, to be obtained on an undertaking to bring her back within his jurisdiction ?

In the appellant's case laid upon your Lordships' table, there are remarks which I was rather surprised to hear gravely repeated by the appellant's counsel at the bar ; that the order appealed against is a violation of the articles of Union between England and Scotland. The order does not, in the remotest degree, proceed upon the supposition that the Court of Chancery has any power judicially to review the proceeding of the Court of Session of Scotland, and to set aside an appointment of guardians confirmed by the authority of that Court. The order, I conceive, would have been the same had the infant been French, and the appointment of tutors, under whatever authority she came into England, had been made in France, according to the law of France, and confirmed by a French Court of competent municipal jurisdiction. The order, I think, would have been erroneous, but it would have been no assumption of jurisdiction over the French Court, and would only have proceeded on what I regard as a mistaken view of the law of England, that wherever there is an

* 142 * infant resident in England, guardians must be appointed to the infant by the Court of Chancery of England. I conceive, that according to that law, even with respect to a child of English parents born and domiciled in England, the Court ought not to interfere to appoint guardians, unless there be property belonging to the infant to be taken care of, or unless the personal security, proper education, or marriage of the infant require the appointment of guardians. This rule, which is extremely reasonable in itself, is to be collected from *Ex parte Belcher*, (a) and it seems to have been uniformly acted upon. Not an instance has been cited or can be cited of the Court of Chancery interfering to appoint guardians, the infant having no property within the jurisdiction of the Court. In *Wellesley v. The Duke of Beaufort*, (b) where guardians were appointed, the father absent from this country, there was large property within the juris-

(a) 1 Bro. C. C. 556.

(b) 2 Russ. 1.

diction to be protected, and the appointment of guardians was clearly for the benefit of the infants.

The interference of the Court appears particularly officious in a case like the present, where the infant being here for a temporary purpose has large property in another country, has guardians taking charge of that property under the superintendence of the supreme Court of that country, and is tenderly and judiciously taken care of here under the authority of those guardians. In this case, not only would the will of the father, as to the custody, care, and education of the child, and the management of her property, be entirely defeated, but a heavy expense must be incurred by the double accounting in the Court * of Session and in the Court * 143 of Chancery. Such an expense in some cases might eat up all the profits of the estate, and leave the infant without means of subsistence. I must likewise observe, that in a case like this, where there is no property in England, I know not how the order is to be carried into effect. An appointment of receivers to collect the rents of real estates in Scotland or France, or any other foreign country, might be treated with very little respect where it is to operate, might give rise to a collision of jurisdiction, very much to be deprecated, and I believe cannot be rested either on precedent or principle for its justification.

It has been urged at the bar, that where a bill is filed fraudulently in the name of an infant alleging property within the jurisdiction, there might be a summary application to the Court to take it off the file ; but the objection would be made, that this fact cannot be tried on affidavit. However, in this case, it now sufficiently appears to the House, and is not seriously disputed, that the allegation of property within the jurisdiction is colourable. Then it is contended that the suit should go on to its conclusion, and that then justice will be done : but the nominal plaintiff will cease to be an infant before the suit is concluded. Part of the prayer of the bill is, that the tutors may account for all the rents and profits which they have received from the estates of the infant since the death of her father, or which they may at any time hereafter receive. If the order stands, and guardians are ap-

pointed under it, there seems to be an almost absolute certainty that the infant must remain under their care, and that her property must be administered in the Court of Chancery during the whole period of her minority. I con-

* 144 ceive that the * case ought to be disposed of as if there had been, as there might have been, a petition for the appointment of guardians without any bill being filed; in which case the Court must have considered whether, in respect of the person or property of the infant, any case was made for the appointment of guardians. The bill was palpably and avowedly filed merely for the appointment of guardians, and it does seem very strange that the mere filing of the bill should render it inevitably necessary that guardians should be appointed. This argument applies with equal strength whether the father of a foreign infant be alive or dead, and whether the infant reside within or beyond the jurisdiction of the Court.

Upon the whole, I am strongly of opinion that the petition for the appointment of guardians ought to have been dismissed by the Lord Chancellor, and ought now to be dismissed by this House.

I was much struck by the objection at one time made, that by setting aside the order of the Lord Chancellor we must set up the second order of the Vice-Chancellor, against which there is no appeal. We have been asked by the learned counsel for the respondent to disregard technical objections, and to decide the case on the merits of the application for the appointment of guardians. Independently, however, of any waiver, upon consideration I think the objection could not be supported. Upon a writ of error from the Courts of Common Law, your Lordships, as the ultimate Court of error, are to look to the whole record, and to pronounce the judgment which the Courts below ought to have pronounced. I conceive that the same principle guides your Lordships upon appeals from Courts of Equity. The Lord Chancellor

* 145 was to consider what order ought * to have been made by the Vice-Chancellor; and, very properly disapproving of both the orders made by the Vice-Chancellor, he might have made an order for dismissing the petition, if he thought

that that was the order which the Vice-Chancellor ought to have made. The order which the Lord Chancellor could and ought to have made, it is now the duty of your Lordships to make.

I am aware that, as my noble and learned friend, from whose order this appeal is brought, has not altered his opinion as to the propriety of the order, a majority of the noble and learned Lords who offer advice to your Lordships on this occasion think that the order ought to be affirmed; but, differing from them, and being obliged to give my voice for reversing the order, I have thought that I should act respectfully to them, and in the discharge of my public duty, by stating fully the reasons on which my opinion is founded, in a case of such difficulty and magnitude.

LORD LANGDALE. — Amidst the differences of opinion which exist in this case, it is satisfactory to me that no doubt is thrown upon the jurisdiction of the Court of Chancery to appoint guardians for any infant residing in England. The whole property of an infant may be situate in a foreign country, and tutors and curators of the person and estate of the infant may have been duly appointed according to the law of the country where the property is; and yet it may be evident that, without the authority of a guardian duly appointed here, and subject to the control of the Court of Chancery, the infant may be without the protection which may be absolutely necessary for its welfare, and even for its safety. * The jurisdiction being indisputable, the ex- * 146
ercise of it in particular cases becomes a matter of discretion and expediency, depending on the peculiar circumstances of each case; and it is alleged that in this case the Court of Chancery ought either to have appointed the Scotch tutors and curators to be guardians, as was done by the second order of the Vice-Chancellor, or ought otherwise to have refused to interfere at all, because no misconduct was imputed to the tutors and curators.

The case, as far as it is known, — and I beg emphatically to say, as far as it is known, for the case is still subject to inquiry and investigation, and is, of course, but imperfectly

known, appearing only on the affidavits of the parties, the effect of which may be materially altered, — but the case, so far as it now appears, is of the most simple description. An infant, whose whole property is alleged to be in Scotland, and whose tutors and curators are usually resident in Scotland, is now resident in England and entitled to the protection of the English laws. Her grandfather, also resident in England, assuming, as he has a perfect right to do, to be the next friend of his grandchild, files a bill in her name in the Court of Chancery, praying, amongst other things, that her fortune and person may be protected by the Court, and that proper directions may be given for her maintenance and education. It may have been right or wrong to institute this suit. The usual and proper mode of trying that question is to apply to the Court of Chancery on behalf of the infant to have it inquired into and ascertained whether the suit is beneficial or prejudicial to the interests of the infant.¹ If upon inquiry it

appears to be contrary to the interests of the infant * 147 that the suit should be prosecuted, the * Court stays the further prosecution of it, and charges the cost upon those by whom the suit has been improperly commenced; but in this case there has been no application made for any such inquiry, and upon the bill being filed the infant became a ward of the Court of Chancery; and at the same time it became the duty of the Court to protect her interests, or to see that they were duly protected. The usual and regular mode of doing this is by appointing guardians. It is true that if an infant be improperly detained by any unauthorized person, the Lord Chancellor may, by writ of *habeas corpus*, have the infant brought before him and set free. But upon a *habeas corpus* I apprehend that the Lord Chancellor has no more authority than is possessed by a Judge at common law; and for the protection of the infant, that authority is of a very different kind and of greatly inferior efficacy to that which is possessed by the Court of Chancery on the appointment of a guardian.

The order complained of refers it to the Master to approve

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 70; *Garr v. Drake*, 2 John. Ch. 542.

of proper persons to be guardians, to inquire and state the infant's age, what relations she has, and the nature and amount of her fortune, and on what grounds he approves of any particular persons to be guardians; and he was to consider a scheme for the residence of the infant, and what would be proper to be allowed for her maintenance and education. This is very nearly the order which, in ordinary cases, is made by the Court for the protection of infants, within its jurisdiction, on whose behalf its protection is required. The guardians appointed under such orders are properly to be considered, as has been stated by my noble and learned friend, as officers of the Court appointed to carry its intentions into effect and to act under its control for the benefit of the infants. * In approving of * 148 guardians under the order, the Master is bound to use his best discretion to make all necessary and proper inquiries, and to take all the circumstances of the infant into his consideration. The Scotch tutors and curators, whom I assume for the purpose to have been properly appointed, being out of the jurisdiction and consequently not subject to the control and authority of the Court, it would not seem to be consistent with sound discretion to appoint them sole guardians, unless other arrangements could be at the same time made to secure for the infant that protection which it is the duty of the Court to afford.

But it may be admitted, and I think properly, that the appointment of tutors and curators by the father, though it may not be valid in England, is entitled to the greatest and most attentive consideration, and that the Court of Chancery would be strongly inclined to act upon it so far as it could consistently with its duty of maintaining that authority over the infant which is so entirely necessary for the protection of the infant while in England. One obvious mode of attending to the appointment made by the father of tutors and curators resident in Scotland, and at the same time of securing the authority and control of the Court over the person of the infant while in England, would be to associate in the guardianship some persons residing in England with the tutors and curators residing in Scotland; and when we are consider-

ing a case of discretion, it is important to observe that an offer of this kind was made to the complaining parties by the Lord Chancellor before he pronounced the order now in question.

It has been supposed that the order will lead to a
 * 149 direct conflict between the laws or the Courts of * Eng-
 land and Scotland, and that the order is so expressed as wholly to exclude the Scotch tutors and curators from the office of guardians. I conceive this to be wholly erroneous; we ought to presume that the Courts of England and Scotland will be equally anxious to do that which may appear to be most beneficial to the infant. The person is in the one country, the property is said to be wholly in the other. Instead of conflicting with one another, why should not the respective Courts of the two countries be mutually assistant in promoting their common object? We are not to presume the existence of any feeling likely to prevent them from so acting as to promote the common object, in the manner authorized by their respective and independent jurisdictions and forms; and although it is not to be expected that either the Master would approve or the Court appoint persons resident out of the jurisdiction to be sole guardians; yet there is nothing in the order to prevent the Scotch tutors and curators from proposing themselves to be guardians together with one or more persons resident in England, who might also be proposed by themselves, approved of by the Master, and appointed by the Court; and in the peculiar circumstances of this case it may possibly appear, upon the inquiry before the Master, that it would be beneficial to the infant to have guardians both in England and Scotland.

One part of the order requires the Master to consider of a scheme for the residence of the infant; and it being supposed in the argument that there is some general and inflexible rule binding the Court to keep its infant wards within the jurisdiction, it is thence inferred that under this order the Master cannot consider whether the infant ought at any time
 * 150 to be permitted * to reside in or to visit Scotland. It is undoubtedly a general and useful rule that an infant ward is not to go out of the jurisdiction without special leave,

and in the absence of special circumstances ; but when special circumstances occur — and it may appear by the Master's report that they exist in this case — the special leave is always given. There are infant wards of the Court now abroad with leave given, sometimes for the general benefit of the infants, sometimes for the sake of health or peculiar instruction, and even for the sake of amusement. The infants who become wards of the Court of Chancery have indeed great and peculiar protection, but they are not debarred of any freedom or of any advantages which the most careful, considerate, and liberal parent would desire his child to possess.

Those who imagine that the Court acts necessarily upon any fixed and inflexible rules in the management of infants, appear to me to forget the paternal and discretionary nature of the jurisdiction, the great care and anxiety with which the interests of the infant wards are constantly attended to, the changes of regulation which are so easily made even from day to day, if required by a change of circumstances, and the extent to which all technical and positive rules are made to bend to the peculiar circumstances which may be from time to time presented by individual cases.

I consider it to be premature and useless to speak of plans of management, and the consequences of them, or the difficulties of carrying them into execution, till the subject has been fully investigated, and the facts are ascertained and stated, and the plan is proposed in the Master's report. But I may perhaps be allowed to observe, that if it should ultimately * appear most beneficial to the infant to reside * 151 sometimes in Scotland, sometimes in England, if guardians were appointed, some or one of them resident in England and some or one of them resident in Scotland ; and if it should unhappily become necessary to call upon the Courts of the two countries to exercise their powers, I know of nothing which would render it impracticable for the English Court of Chancery to order the guardian resident in England to deliver up the infant to the guardian resident in Scotland. And why should we doubt that the Scotch Courts would consider beneficial to the infant the same course of management, which

upon evidence and consideration had been approved by the English Court of Chancery; and, if necessary, order the guardian resident in Scotland, being the tutor or curator there, to deliver up the infant to the guardian resident in England? I cannot anticipate differences of opinion, or that either of the Courts would have any difficulty in directing that which would be most beneficial to the infant. It is not reasonable to suppose that the guardians to be appointed under the order will conflict, or that the Courts of the two countries will conflict in such a matter. It is possible that in carrying out any scheme difficulties may arise, more especially if those whose duty it is to concur in all things for the benefit of the infant should refuse or neglect to do so. If difficulties should occur, they must be met as they best may, by adopting that course which under the circumstances shall appear to be for the benefit of the infant;¹ but at present it does not appear to me that there is any difficulty whatever. The infant is here, and entitled to the protection of the Court of

Chancery; and it is, amongst other things, to be in-

* 152 quired where she ought to reside. * Whether she

ought to remain here or to be sent to Scotland, it is in either case necessary to appoint a guardian who may have a legal control over her person, to protect her whilst here, or, if proper, to deliver her to the person duly appointed to protect her in Scotland.

It has been stated that it would be unsafe and imprudent to take the infant to reside in Scotland, and the tutors and curators have expressed no intention to remove her to Scotland; and in this state of things the complaint made of this order is somewhat singular. The tutors and curators seem to say that the infant ought to be in England, where she cannot be protected by the Courts of Scotland, which have no jurisdiction over her person in England. At the same time they say that she ought not to be protected by the Courts of Chancery in England; and therefore that in the result she ought to be left in England to the care or neglect of the tutors and curators resident in Scotland, free from the control of, or re-

¹ See *Stuart v. Bute*, 9 H. L. Cas. 465, 466.

sponsibility to, the laws relating to guardianship which prevail in either country.

My Lords, for the reasons which I have stated, I am of opinion the order complained of ought to be affirmed.

LORD BROUGHAM. — I have listened with the greatest attention to the arguments of my noble and learned friends, and I retain my opinion. But I desire to have it distinctly understood that the argument on the supposed inconsistency of the order with the treaty of Union forms no part of my reasons; I disclaim it entirely, and think it puerile and absurd. As well might it be said to be against the treaty of Union that the Court of Queen's Bench should entertain * an action of *assumpsit* on a judgment of the Court * 153 of Session; or that its referring to and upsetting that action, on the ground of the parties having been decreed against without any notice of the suit, as was once determined in a like action in a West India foreign judgment, was against the treaty of Union.

But I desire to ask a question of my noble and learned friends, who have contended for protection to infants, upon the ground that an application to the Great Seal will always ensure the fullest liberty to the Scotch ward. Will they be pleased to tell me this: Suppose a Scotch ward, Lady Loudon for instance, late Marchioness of Hastings, twenty years of age, but under twenty-one, and having Scotch honours and estates, were made a ward of Court here, would the Court of Chancery for a moment listen to her application for leave to go to Scotland and there marry the man of her choice, and make the settlement she chose on him and his issue, as the settlement her Scotch guardians chose; and would she be suffered to marry and to settle as she and they pleased, without leave first had and obtained of the Court of Chancery here? This question I desire to have answered by those who hold that it makes no kind of difference in a person's position to be made a ward of Court.

The judgment of the House was, that the appeal be dismissed, and the order complained of affirmed.

Mr. Follett asked that the costs of the respondent in the appeal might be costs in the cause.

THE LORD CHANCELLOR. — The House makes no order as to the costs of the appeal.

1839.

THE TRACY PEERAGE.

Evidence. Old Prayer-book. Age of Handwriting. Scientific Witnesses. Tombstone. Inscription.

The case of a claimant to a peerage depending on the genuineness of entries written in an old prayer-book, and dated 1728 and 1729, several witnesses, whose occupations for a long time made them so conversant with manuscripts of different ages, that they could take on themselves to name the period in which any manuscript previous to the year 1700 was written, were all of opinion that the entries were written in the early part and before the middle of the last century, and at or about the period of their dates.

Held, that such evidence is but small testimony, hardly entitled to any weight, especially as the book containing the entries was not satisfactorily identified.

A claimant to a peerage, after his case was referred to the House of Lords, and evidence taken on it, presented an additional case, alleging an inscription on a tombstone in a churchyard in Ireland ; which, if proved, would sustain his claim. The tombstone could not be produced. Several witnesses from the neighbourhood swore positively that they saw the tombstone and inscription about twenty years ago. There was no material discrepancy in their statements, nor were any witnesses called to contradict them.

Held, that the evidence was not sufficient of the existence of the tombstone or of the inscription ; and that the neglect of the claimant to produce this material part of his case earlier, induced a suspicion of fraud ; which could not be removed without the production of the tombstone, or of other witnesses of greater credit from the neighbourhood.

(See other points on evidence, *infra*, pp. 156 and 157, 167 and 173.)

May 7; June 18, 1839. March 21; May 2, 30; June 9, 1843.

A PETITION was presented to the House of Lords in the year 1835, by Joseph Tracy, of Geashill, in the King's county, in Ireland, as Viscount Rathcoole, setting forth the creation and descent of the dignity of Baron and Viscount Tracy, of Rathcoole, in the county of Dublin, and praying their Lordships to allow him to prove his right to vote at the election of representative peers of Ireland. (a) The House referred the petition to the Lords committees for privileges; but before any *proceeding was taken thereon, the peti- * 155 tioner died. His son and heir, James Tracy, then presented his petition to his late Majesty, praying that it might be "declared and adjudged that he was entitled to the title and honours of Viscount and Baron Tracy, of Rathcoole, in the kingdom of Ireland. (b) That petition was referred by his Majesty to the Attorney-General (Sir J. CAMPBELL), and with his report annexed was referred by her present Majesty to the House of Lords, and by the House to the Lords committees for privileges.

The evidence produced in support of the petitioner's case before the committee for privileges, at their several sittings on the 7th May and 18th June, 1839, and 21st March, 1843, — consisting of inrolments, wills, registers of births and deaths, pedigrees, and monumental inscriptions, — showed that, by letters-patent dated the 12th of January, 1642, Sir John Tracy, of Toddington, in the county of Gloucester, knight, was created Baron and Viscount Tracy, of Rathcoole, in the county of Dublin, in the kingdom of Ireland, to hold to him and the heirs male of his body: that he was succeeded by his only son Robert, second Viscount Tracy, who, being twice married, had by his first wife seven sons, and by his second wife two sons, herein after mentioned: that John, the eldest of the seven sons, succeeded to the dignities on the death of his father in 1662, and was himself succeeded in the year 1687 by his eldest son William, fourth Viscount and Baron Tracy: that this William died in 1712, leaving an only

(a) 67 Lords' Jour. 139.

(b) 70 Lords' Jour. 599.

son, Thomas Charles Tracy, fifth viscount, who died in 1756, and was succeeded by his eldest son, also named * 156 Thomas Charles, who died without issue * in 1792, when the titles devolved on his half-brother, the Rev. Dr. John Tracy, seventh viscount; upon whose death, without issue, his only surviving brother Henry Leigh Tracy became eighth and last Viscount and Baron Tracy, and died in 1797, leaving an only child, a daughter, afterwards the wife of Mr. Charles Hanbury, who thereupon took the name of Tracy, and has been lately created Lord Sudeley.

The only points worth notice that occurred in the reception of the above evidence were the following : —

1. The incumbent of the united parishes of Doddington and Didbrooke, in Gloucestershire, being too old and infirm to attend the committee with the registers, his curate for Doddington produced the registers of both parishes, saying, on cross-examination, that he was curate of the one parish only, and had the joint custody of the register thereof with the incumbent; that the two parishes had separate registers, kept in the same iron chest; and that there was another curate for Didbrooke parish.

To an objection taken by the Attorney-General, that the witness was not connected with Didbrooke, the counsel for the claimant submitted, and said he would on a future day produce that register by the curate of Didbrooke; and he did so.

2. The inrolment of the letters-patent, dated 18th of Charles 1 (1642), creating the dignity in Sir John Tracy, being produced by a clerk from the record office in the Rolls chapel, the committee inquired whether search had been made for the original. The counsel for the claimant answered that the letters-patent could not be in the possession of the claimant, nor in any possession to which he could get access:

he did not inherit any property from, nor was he * 157 * personal representative of, the last viscount; and therefore he had no muniments to refer to, nor was he entitled to search among the muniments in the possession of those who have the family property.

The committee then received the inrolment, and an examined copy thereof was given in and read.

3. Mr. King produced from the Heralds' College a book containing a pedigree, among others, of the Tracys, signed by two persons of that name. He described it as the original visitation-book of the county of Gloucester, taken in 1623 by William Camden, Clarenceux King-at-Arms, in pursuance of a commission of visitation granted to him by James 1. The book had no title-page or date, nor did Camden's name appear in it; but it appeared from an inrolment, before received in evidence, that a commission of visitation was granted to him the 1st of James 1, and there was no doubt that he was Clarenceux King-at-Arms and living in 1623. The book was numbered C. 17, and had the same appearance, in all respects, as the other visitation-books in the college, of prior and subsequent dates, — as those numbered C. 16 and C. 18. The pedigrees in book C. 17 had the date 1623.

The Attorney-General objected to the reception of this book, without prejudice to its being offered again if further evidence could be given of its authenticity; and the counsel for the claimant withdrew it, but afterwards, on the production of certain wills supplying such evidence, the Attorney-General withdrew his objection, and the pedigree was received.

The further evidence taken at the sittings of the committee on the 2d and 30th May, 1843, showed that, in 1797, all the male descendants of Robert, the second Viscount and Baron Tracy, by his first * wife, were extinct, and *158 therefore the succession to the dignities opened to his male descendants by the second wife; by whom, as before stated, he had two sons, namely, Robert Tracy and Benjamin; that this Robert was a member of the Middle Temple, called to the bar in 1673, and appointed a Judge of the Court of Common Pleas, at Westminster, in 1700; that he retired from the bench in 1726, and died in 1735, at the age of eighty years.

The petitioner sought to derive his descent directly from Judge Tracy; and his statement was this: that the Judge

had three sons : first, Robert, who died without issue ; second, Richard, who left an only son, who died without issue, — all which was clearly proved ; — and third, William ; that this William, whom the petitioner claimed for his ancestor (his great-grandfather), settled in Ireland, having incurred his father's displeasure by marrying a Miss Mary O'Brien, daughter of a merchant in Dublin ; that by his said wife he had two sons, James Tracy and Timothy, both born in Dublin in 1729 and 1730 respectively ; after which he removed with them and their mother to a place called Ross, in the King's county, and, dying there in 1734, was buried in Castlebrack, in the Queen's county ; that his eldest son, James, lived at Gurteen, in the parish of Geashill before mentioned, and died there in 1794, leaving, besides other issue, the first mentioned petitioner, Joseph Tracy, his eldest son, the father of this claimant.

To prove that the Judge had a son named William (which was one of the difficulties of the case), the register of St. Andrew's, Holborn, was produced, showing an entry, dated the 22d of February, 1698, of the baptism of " William, son of Robert Tracy, Esq., and Ann, in Tuck's Court ; "

* 159 but there was no * proof that this Robert Tracy was the Robert who became the Judge. Reference was also made to a statement in " The Baronetage of England, by Arthur Collins," published in 1720, that Mr. Justice Tracy had three sons : Robert, Richard, and William, then living ; but this statement was not admissible in evidence. A family prayer-book was next produced, containing the following entries ; on the title-page : —

" James O'Brien, September 1st, 1730 ; "

and on the other side of that page : —

" Married in Dublin, April 17th, 1728, William, son of the Honourable Robert Tracy (late one of the English Judges), to Mary, daughter of Mr. James O'Brien, merchant. "

" James Tracy, their eldest son, born January 27th, 1729. "

" Timothy Tracy, second eldest, born June 26th, 1730. "

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And on page 89 of the same book, on the backs of two copper-plates :—

“ This book belonged to my grandfather, James O’Brien, afterwards to my father William Tracy, who was an Englishman : it contains the entry of his marriage, and the births of my elder brother James, and my own. I now give it to my nephew, Joseph Tracy, of Geashill.

“ Coole, August 10th, 1796.

“ TIMOTHY TRACY.”

A second printed case, laid by the claimant before the committee by leave of their Lordships, contained, in addition to the above statements, a reference to an inscription on a tombstone, which was stated to have formerly stood in the burial ground of Castlebrack, in the Queen’s County, and was as follows :—

“ Erected by Mary Tracy, to the memory of her husband William Tracy, Esq., late of Ross, in the King’s County, the third son of the Honourable Robert Tracy, late one of the Judges of the Common Pleas in England, who departed this life the 15th October, 1734.”

And on the 2d of May, 1843, several witnesses were * examined respecting this tombstone inscription, and * 160 also the entries in the prayer-book. First, as to the prayer-book produced from the custody of the claimant, Mrs. Mary Atkin, examined by the *Solicitor-General*, who was then counsel for the claimant together with *Sir Harris Nicolas*, (a) gave her testimony to this effect :—

She said she was seventy-six years of age, was the widow of an engineer and machine-maker, who died in 1831 ; was herself an Irishwoman, daughter of a farmer, and was brought up a dress-maker. She knew, and often worked for a Mrs. Tracy, who lived in Exchequer Street, Dublin, and used to deal for goods at Mrs. Tracy’s brother’s, Mr. O’Brien, a woollen-draper in Dublin. She often heard Mrs. Tracy speak of her husband’s family, and that her husband was the son of the Honourable Robert Tracy, a Judge in England. That was in 1786, the year before Mrs. Tracy died, she being then about eighty years of age. Mrs. Tracy

(a) At the sittings of the committee, in 1839, *Sir F. Pollock*, *Mr. Hedley*, and *Mr. Gibson*, were counsel to the claimant. But now *Sir F. Pollock*, being her Majesty’s Attorney-General, attended on behalf of the Crown.

used to say that she believed the cause of the neglect of herself and her husband by his family was, because he married her, a tradesman's daughter. She, on one occasion, produced to witness's father, in the presence of witness, a prayer-book with entries of her marriage and her children's births ; witness never saw that book since ; Mrs. Tracy had been a widow for several years ; her son, James Tracy, sometimes came to her from the country, with his wife and son Joseph. The prayer-book being handed to the witness, she said it was the same, or very like the book she saw with Mrs. Tracy ; and after reading aloud the entries in the first page, she said they were the same she saw fifty-seven years ago.

A great many questions were put to the witness by the Attorney-General and by several peers, chiefly with a view to test her memory and credit. From some of her answers, it appeared that since her husband's

death, in 1831, she supported herself in London by needlework and * 161 monthly nursing. How * she came to be a witness was, by having

read in a newspaper an advertisement for any old person who knew a family of the name of Tracy, in Dublin, fifty-seven years ago. She answered that advertisement by letter, and then Mr. Tracy called on her.

Sir Frederick Madden, examined by the *Solicitor-General*, and questioned by several Lords, said he was assistant-keeper and keeper of the department of manuscripts in the British Museum, from the year 1828 ; and that, from the great mass of manuscripts of various sorts and of different periods that passed through his hands in his office, he had acquired such a knowledge of handwriting as to consider himself able to give his opinion of the age of any writing that came before him. The entry in this book, now shown to him, had been submitted to his inspection before by Mr. Tracy (the claimant), and he saw no reason why it should not have been written at or near the period of the last date in the page (1730). The handwriting appeared to him to be, and he was of opinion that it was, the handwriting of that period. It was the character of the handwriting that was then common among men of some, not high, education ; he would not call it a good hand, but a fair hand for the period, from the way in which the capital letters were formed. He had been accustomed to see a great many letters written in Ireland as well as in England about that period. It was from the general character of the handwriting he judged. He thought there was considerable difference between the writing in Ireland and the writing in England at that period. He doubted whether the entry in the corner of the title-page, " James O'Brien, September 1st, 1730," was written by the same hand that wrote the entry in the next page. He doubted it from a comparison of the form of some of the letters (pointing them out), though there was some resemblance ; but he considered it was a different hand, the letters O, and p, and B are formed differently. If those entries were shown to him without any date, he should say they were written in the first half of the last century. He could not fix any particular period to a particular writing, particularly after the year 1700 ; it would depend on the grade of the

writer. He could know the handwriting of Pope, Swift, and of Addison, as well as he knew his own. There was no resemblance * between theirs and the handwriting of these entries ; these were * 162 in the character of handwriting of a person of an inferior grade in education to Pope or Swift ; it was not the hand of a man much accustomed to write, for it was not a current hand, but a set hand. He should say it was not the handwriting of a highly educated man like Pope or Swift, but of a man who received a fair education.

Cross-examined by the *Attorney-General*. — Witness should say decidedly this was not the handwriting of the latter part of the eighteenth century or of the last ten years. The character of the writing, particularly of the numerals, would be against such a supposition ; all the figures are made large. He judged from the character and general appearances ; and spoke to the best of his belief. He could not point out any particular letter which, by its shape, indicated that it might not have been written by a schoolboy within the last ten years. Of handwriting, since the year 1700, there was great difficulty in fixing the period ; but none as to writings previous to 1700. If the writings were genuine, he had no doubt that alphabets might be made of each period before 1700, but not since. He never made any such alphabet, but he had no doubt one could be made, particularly of the age of Queen Elizabeth ; but after the seventeenth century writings varied so much there might be difficulty. He could not point out any single letter in these entries that had any tendency to fix them to the year 1728 or 1729 ; it was from their general appearance that he judged of their age. He should say that the writing in page 39 (a) was written by a person not so well educated as the writer of the other entries, and that it was not of the same period ; but the pages were so dirty it was difficult to give a decided opinion.

Being then re-examined by the *Solicitor-General*, witness said the ordinary handwriting of a person of ordinary education in the present time was entirely different from the writing of persons of the same rank in the last century ; and a person of skill looking at handwriting might tell, without comparison of the shapes of the letters, whether it was of one century or the other ; and such a person would at once say that these entries could not have been written within the last fifty * years. From their whole appearance, he should take them to be * 163 of the first part of the last century.

Sir Thomas Phillips, next examined in respect of these entries, said he had much acquaintance with the handwriting of different periods, — having been for some years so conversant with researches in ancient written documents as to be able to ascertain the difference between the handwritings of various periods. He had in his possession a valuable collection of manuscripts of different times, and was well acquainted with the

(a) See the account of that writing, *infra*, pp. 167, 168.

character of the writing of the earlier part of the last century. Looking at these entries he should say — speaking generally from the character of the handwriting — that they were of the handwriting not of the earlier part, but of the middle of last century, or between 1740 and 1750.

Cross-examined by the *Attorney-General*. — Witness said the general characters of the letters were altogether different from any thing lately written. From the general appearance of the writing and of the book, and the paper of the book, he would assign them to the middle of last century. He could not, however, say decidedly that there was any thing in the shape or appearance of the letters of the writing inconsistent with the supposition that it might have been written within the last ten years by a schoolboy who had written for eight or nine years, or a person who did not write a running hand. He did not think (in answer to a Lord) it could be the writing of a gentleman of education, born in 1692.

Mr. Thomas Davis, examined by *Sir H. Nicolas*, said he had been in the Prerogative Office for thirty-one years, employed in taking care of the manuscript books there. He had examined the entry in this book before ; and his impression then and at the present time was, that it was the writing of the dates it purported to bear (1729 and 1780).

On cross-examination by the *Attorney-General*, he said he could not point out any word or letter in the entry which differed from the writing of a schoolboy in the present age who had not acquired a running hand. He thought the figures were different from a schoolboy's of the present time.

The counsel for the claimant, after giving proof — by production of the register of the parish of St. Andrew's,
 * 164 * Dublin — of the burial of "Widow Tracy, 13th September, 1787," and also examining witnesses to show that, after diligent search, no register was found of the period of her marriage with William Tracy, proceeded then to examine witnesses to the alleged inscription on the tombstone which his said widow was said to have erected to his memory in Castlebrack burial-ground, in the Queen's County : —

Patrick Culleton said he was aged seventy, a farmer of twenty-four acres for two lives or twenty-one years, under Sir C. Coote ; was born and resident all his life within two miles of Castlebrack ; used to remark a tombstone there with the words on it : "Erected by Mary Tracy, in memory of her husband William Tracy, the son of an English Judge," with more words which he did not recollect ; saw it repeatedly from fifty years ago till about twenty years ago, since which he did not see it, because it was not there since ; it was broken in three or four places when he used to see it. The burial-ground was an open place by the roadside,

for cock-fighting and pushing-stones to see which was the strongest man, and a fair for horses and cows. That is the way the tombstones were broken ; for when the pushing-stones were shoved, they could not help falling on the tombs. This tombstone was lying on the ground, the two ends higher, being cracked across the middle. There is no church there at all, nor in the parish, but there is a minister. Mr. Kemmis, five miles distant. Witness knew James Tracy, who had lived at Gurteen, four miles from Castlebrack, and died forty years ago, and was buried in Castlebrack, by the side of this tombstone. There were several other Tracys buried at Castlebrack. Witness's attention was first directed to the tombstone, fifty years ago, by a friend named Tracy. They were at a cock-fight one Sunday night ; as they were walking about, waiting for the cocks, this friend said, " Come over here, Paddy, and I will show you the son of an English Judge, who was buried here." Many of us were surprised what brought the son of an English Judge there.

The witness being cross-examined by the *Attorney-General* for Ireland (who on this occasion attended for the Crown *with the *165 *Attorney-General* for England), said he just owed one and a half year's rent ; there was always a running gale. He was cousin of the claimant's mother ; would not account him ungrateful if he became Viscount Tracy, and did not pay these arrears of rent. He had heard sometimes of tombstones being put as hearthstones, but never said to anybody that this tombstone " was in Miles Macavoy's hearth, with its face down, but no writing on it," nor any thing of that kind. There are Protestants as well as Roman Catholics in the parish ; some Tracys there are of one religion, some of the other, and not of the family of Tracy the claimant.

Martin Heagney, another farmer from the parish of Castlebrack, forty-six years of age, said he knew the churchyard all his life, and remembered an inscription on a tombstone : " Erected by Mary Tracy to the memory of her husband William Tracy, late of Ross, in the King's County, son to Judge Tracy, of England." It was twenty-four or twenty-five years since he saw the tombstone ; it was then broken across the inscription, but a good deal of it could be read. It used to be talked about, and wondered at, that a Judge's son should come to be buried there.

Patrick Quarter said he was aged seventy, a labourer, from Kennyhinch, four miles from Castlebrack, which he knew well for forty-five years, up to twenty years ago. He described the burial-ground, tombstone, and inscription as the two former witnesses did ; and, in answer to the *Attorney-General's* cross-examination, said, that about six weeks ago Mr. Tracy applied to him, as being the oldest man in the place, whether he recollected the tombstone of William Tracy, the son of the English Judge ; and he told him all he knew, and then was brought here.

John Behan, another labourer, and Denis Moran, a farmer,

from near Castlebrack, spoke to the same effect as the former witnesses.

All these witnesses were cross-examined at great length, with a view of testing their credit, and also of suggesting to the committee that there were several gentlemen of intelligence and respectability residing in the neighbourhood of Castlebrack, who, if the alleged tombstone and inscription had ever existed, might be easily produced to give a satisfactory account of them.

The committee adjourned to the 30th of May, to give the claimant time to bring over other witnesses ; and he on that day produced the following : —

Barrakie Lowe Tarlton said he, and his family before him for 200 years, lived at Killee, in the King's County ; he had property of his own, and rented a farm under Earl Digby ; was a lieutenant in the yeomanry, a common jurymen at assizes, and a grand jurymen at sessions. He lived within two miles of Castlebrack ; knew the burial-ground for forty years ; had relations buried there. In 1812 he accompanied his uncle to the burial-ground ; his uncle was about erecting a new tombstone to his family ; and while looking about there he discovered this tombstone of the Tracys, and by his desire witness rubbed the face of it with dock-leaves, and then they saw the inscription mentioning the stone to be erected by Mary, the beloved wife of William Tracy, a son of a Judge in England, the Honourable — could not say whether Robert or Richard, — an English Judge, or one of the English Judges. One corner of the stone was broken off, and it was cracked in the centre, and half in the ground, half over. Saw the same stone a year after, when part of it was gone, but some part, with the inscription, remained. His uncle had taken down the inscription in pencil, and witness took a copy of that at home in writing, but not knowing it would ever be wanted, took no care of it ; had it in his possession twenty years, but on searching for it afterwards could not find it. His uncle kept the pencil copy in his pocket for the two or three days he was with witness.

Patrick Boyne, a farmer, living on his own property, a 50*l.* freeholder, from near Castlebrack, said he saw the tombstone and read the inscription in 1813, and again in 1816, but not since ; it was more broken in 1816 than in 1813.

The Rev. John Dunn, curate of Killahee, eight miles from Castlebrack ; was first there in 1825 ; it was very badly fenced ; any one might enter and remove the gravestones. There was a sextoness, who took no care of the place.

June 9, 1843.

The evidence having been closed, the *Solicitor-General* was

called upon to sum up for the claimant, and was informed that he need not trouble himself with any part of the evidence except that by which it was attempted to show that the claimant was descended from Judge Tracy.

The Attorney-General asked leave first to read a statement made in February, 1836, by Joseph Tracy, the present claimant's father, who had then a petition before the House. He also referred to an affidavit made by one William Carroll in support of the present claim. These had been laid before the late Attorney-General, and were annexed to his report on the table of the House, and therefore might be read. The importance of them now is, that they give a direct contradiction to the statements of Mrs. Atkin respecting her conversation with Mrs. Tracy about the prayer-book, in 1786. The first printed case laid by the claimant before the House agreed with what is stated in these documents.

The committee were of opinion that these documents, being representations made by the claimant, and coming before the committee through him, became evidence, and might be read as proposed.

The material passages in the statement of Joseph Tracy were as follows: —

I was principally reared by my uncle, the late Timothy Tracy, of Coole. On the 10th August, 1796, he gave me a prayer-book, which he told me he received from his mother, Mary Tracy, otherwise O'Brien, *in or about the year 1748*; and that the entry of her marriage, and the births of her eldest son James and her second son Timothy Tracy, was written in the first page by her husband, William Tracy, who * was the * 168 youngest of three sons of the Honourable Robert Tracy, an English Judge, &c.; and that the book formerly belonged to her father, James O'Brien. And the writing in p. 39, dated 10th of August, 1796, and signed Timothy Tracy, was written by my said uncle in my presence, &c. In 1815 I gave this book to my eldest son James, &c.

The material parts of William Carroll's affidavit of the 4th of July, 1836, were these: —

He recollected, when he was only seven years old, his father and mother living in the parish of Killoughy, in the King's County, having about seven acres of land; that his mother's maiden name was Ann Tracy, and her brothers were James and Timothy Tracy; that William Tracy and Mary, their father and mother, had been then dead some time;

that said William died first ; that deponent recollected, at the time he was twelve years of age, his uncle Timothy coming home from the German wars, and giving deponent's mother money to pay her rent ; that Timothy was after that clerk in the general post-office, became agent to Lord Boyne, and afterwards to Mr. Smyth, of the county of Westmeath, from whom he obtained freehold land at Coole, where he settled and died ; that for many years Timothy used to send money quarterly to deponent's mother in letters, sometimes by post and sometimes by hand, and deponent used to read and answer them ; that deponent's mother died in 1797 or 1798, and his uncle Timothy in 1799, at Coole aforesaid. Deponent also recollected his uncle James Tracy, and that he had a farm from Lord Digby, at Gurteen, Geashill, King's County, and used to come with his wife and son Joseph, who was about deponent's age, to his mother's ; that deponent's mother and uncle James used on those occasions to talk about their family. They used to say that Judge Tracy had three sons ; that William, the youngest, came to Dublin and married Mary O'Brien, and went into partnership with Mr. O'Brien, her father ; but failing in business in 1730 or 1731, William Tracy and his wife, with their two sons James and Timothy, went to Lanally, in the King's County, and settled on Lord Boyne's estate. That deponent used

* 169 to hear them say William Tracy * died there in 1734, and was buried at Castlebrack ; and that Mary Tracy, the widow, lived *until in or about the year 1750*, and that she was buried at Castlebrack. Deponent recollected the death of James Tracy in 1794, and his being buried at Castlebrack, leaving Joseph and two younger sons ; and deponent was ever afterwards intimately acquainted with Joseph, and knew his son James (the claimant). Deponent went in 1796 to see his uncle Timothy Tracy, at Coole, and stayed two days with him, during which they had talk of the family. Timothy said he would go to London as soon as he was able, to look after the property of Judge Tracy, for his nephew Joseph ; that Judge Tracy had three sons, Robert, Richard, and William. Deponent saw a prayer-book at Timothy's house on a desk ; and Timothy, seeing deponent looking at it, said that it was his, Timothy's, mother's gift ; that it was his father's prayer-book and hers, and that she told him to take care of it, and to keep it in memory of his father and her ; that it contained the entry of her marriage to William Tracy, and the births of her two sons. Deponent looked at the book, and read distinctly the entry of William Tracy's marriage, and the births of his two sons, James and Timothy, in the first page. Timothy told deponent that his mother told him that entry was in the handwriting of her husband, William Tracy. That was the first time deponent saw the prayer-book, but he saw it afterwards with Joseph, son of James Tracy, and knew it when he saw it ; and Joseph told deponent that he received it from his uncle in August, 1796. Deponent saw his uncle's writing in page 39 of said book, dated August 10. Deponent went again to his uncle Timothy in 1798. His uncle then said he had given said prayer-book to his nephew

Joseph Tracy. And deponent says the prayer-book now produced is the identical book which he saw with his uncle Timothy.

The Lord Chancellor, addressing the Solicitor-General, repeated that it appeared to the committee that the part of the case requiring observation was the evidence by which the claimant attempted to show that the Judge was his ancestor.

* *The Solicitor-General* then proceeded: I assume, * 170 then, on the part of the claimant, that there is a portion of his pedigree which is free from question; namely, that the title is deduced to the eighth viscount, who died without issue in the year 1797. Assuming, also, that the descendants of the first marriage of the second viscount have been extinguished, by the evidence before your Lordships the question is, whether the claimant has shown his descent from the Judge of the Common Pleas, who was the eldest son by a second marriage of the second Viscount Tracy? Our case is, that Robert, the Judge of the Common Pleas, had three sons, Robert, Richard, and William. Your Lordships have seen that in the claimant's printed case there is a quotation from a work (a) — which I cannot read as evidence—mentioning the existence of the three sons in that order by their names, and stating them to be living at the time of the publication of that work in 1720. We have now to show legal evidence of that fact, or at least evidence that shall satisfy your Lordships of the truth of that statement.

With respect to the two eldest of the Judge's sons, the certificates of their baptisms are not before your Lordships, but there is the certificate of the baptism of the third, William, in February, 1692. It is produced by the present rector of the parish of St. Andrew, Holborn. That William is stated, in the work to which I have referred, to have been the youngest son in 1720; and the documentary evidence has proved the existence of the two eldest sons, Robert and Richard, and their having died leaving no issue.

Now, with regard to the will of Robert, the Judge,
— * taking first that part which is supposed to press * 171

(a) Collins's Baronetage of England, *vide ante*, p. 159.

most against the claim; namely, that there is no mention of William in the Judge's will, nor in the wills of Richard, or Richard's son, — these are the only documents of that time relating to the family in England which have been put in; and in those documents there certainly is no reference to a son William. Robert, his father, has by his will left his property in rather an extraordinary way. He first of all leaves it to Robert his grandson, the son of Richard. The first limitation is to Robert the grandson, and the heirs of his body, and then in remainder to Ann the testator's daughter, the wife of Thomas Wyld, for life, with remainder, not to her children or to her heirs, but to Robert Pratt, and to the heirs male of his body; and then, in case of failure of issue of Robert Pratt, he gives the estate back to the heirs of the body of Ann Wyld, with an ultimate limitation to his own right heirs.

Some question occurred before your Lordships with regard to his not mentioning his son Richard in the will, though he left his property to the son of that Richard. There is no distinct evidence before your Lordships as to the time when Richard died; and therefore I do not lay any stress upon the omission of his name, because he might have been dead when that will was made.

Now, undoubtedly the non-mention in the will of a son of the name of William is presumptive evidence against the fact of his having any such son at that time; and the only mode in which it can be accounted for is one which is consistent with the whole case of the claimant; namely, that the son had married beneath his condition in life, had quarrelled with

his father and family, and had left this country; that
 * 172 he had been * cast off altogether from the family here, and that his father had left his property to the other sons who had not displeased him, and had altogether disinherited this son. If that account be true, it would be sufficient to rebut the presumption arising from the omission of William's name in the will. The ultimate limitation in the will to the Judge's right heirs would have embraced any of his descendants, and William of course, if he existed.

With regard to the omission of William's name in Rich-

ard's will, upon which also stress is laid, it affords no argument whatever against the case of the claimant, because the will of Richard provides only for his own wife and son, and takes no notice of any brother, nor of his sisters, or of any collateral relative ; and yet it is certain that at the date of that will Richard's eldest brother was living, and also his sisters, and their children, though the will does not take any notice of them.

Then, with regard to the will of Richard's son, he leaves his property to a cousin and his heirs. That affords presumptive proof that he died without any issue. Therefore the whole of the descendants from the Judge by his elder sons, Robert and Richard, have failed upon the death of the son of Richard.

That being the state of the case in England, observation is now to be made with regard to William, the third son of the Judge. Assuming for a moment that the baptism at St. Andrew's, Holborn, in 1792, which is unaccounted for in any other way, and which seems not likely to relate to any other person, relates to the son of the Judge, — "the son of Robert Tracy, Esq., and Ann, his wife, in Tuck's Court," — there is no trace to be found in England of the burial or marriage of that William, although numerous registers have * been searched for that purpose. Then, there being * 173 no trace to be found of him after his birth in England, the question arises whether or not there is evidence to satisfy your Lordships that he had removed from this country to Ireland. Now, our statement, according to tradition, is, that he was married in Dublin. I do not know whether the affidavit of Carroll, to which my learned friend has referred, contains any thing on that subject. I have not seen it before. I could not put it in evidence, though it is admissible in evidence against the claimant, who laid it before the Attorney-General.

LORD CAMPBELL. — Any document laid by a claimant before the Attorney-General, and, with his report, referred to the House, becomes evidence.

The Attorney-General read the passages before extracted from Carroll's affidavit, with emphasis on the passage stating that Mrs. Tracy died in 1750; which he said was thirty-six years before Mrs. Atkin's imaginary conversation with her in Dublin.

The Solicitor-General proceeded: To me that affidavit appears to be strongly corroborative of the evidence which has been given at the bar; it is really no contradiction at all of Mrs. Atkin. She states that she saw this book with Mrs. Tracy a year before her death. According to her statement, Mrs. Tracy was buried at the Round Church in Dublin. By the certificate of the burial of Mrs. Tracy, she appears to have been buried there in the year 1787. Mrs. Atkin had a conversation with her in Dublin in 1786. My learned friend refers to the evidence of Carroll, for the purpose of contradicting that. Carroll's statement, as I get it from my learned friend, is that he, being a near relative of this family, was acquainted with Timothy Tracy, who was his uncle;
 * 174 * that he saw in his possession, prior to the year 1796, this prayer-book, and that he saw the entries in it. My learned friend says that is contradictory to the statement made by Mrs. Atkin, who says it was in the possession of Mrs. Tracy in the year 1786; whereas, according to the statement of Carroll, it was in the possession of Timothy Tracy in the year 1796. No doubt it was, and the facts and both statements are perfectly consistent. There is an entry at p. 39. (He read it as above, p. 159.) Is that at all inconsistent with the fact of this book, which according to his (Timothy's) statement belonged to William Tracy, being in the possession of his widow till her death? There is no inconsistency; on the contrary, it directly confirms the statement of Mrs. Atkin, and also the statement of Carroll, that he saw it in the possession of Timothy prior to 1796, and afterwards in the possession of Joseph, to whom Timothy gave it. There is one apparent contradiction; namely, that, according to the statement of Carroll, Mrs. Tracy died in 1750,—a fact of which he could have no knowledge whatever, and his statement before

the Attorney-General was only that he *believed* it to be the fact; and there is the register of her burial produced, and the statement of Mrs. Atkin that she was living in 1786, and buried in 1787. So far as my learned friend calls that a contradiction, it is a contradiction. There is the statement of Carroll's *belief* that she died in 1750; there is a positive oath that she was living in 1786, and that is confirmed by the certificate of her burial in 1787; but there is no contradiction to the prayer-book being in possession of the widow.

I know nothing of the witness examined before the late Attorney-General, whether he was examined *viva voce* or how. But with reference to the evidence of Mrs.

* Atkin, she has been cross-examined at great length, * 175 and it is for your Lordships to state whether or not there is any thing in her testimony or manner of giving it to induce your Lordships to say that she has committed perjury at your Lordships' bar. I have had some experience in the examination of witnesses,—many of your Lordships have had much more,—and I cannot call to mind any thing in the demeanour or the mode in which that witness answered the questions put to her, to induce any one to suppose that she was not stating the truth. She described her situation in life, a respectable one; and she appeared to be a respectable woman. She had lived in this country many years. She was deposing to a fact which had taken place in Ireland before she left it; to a conversation which had taken place, and to her seeing this book prior to her leaving Ireland. What is there to show that she was misstating the fact? (He then read the whole of her evidence from the printed minutes.)

There is another observation to be made on the prayer-book. We have called before your Lordships certain witnesses for the purpose of deposing to the appearance of handwriting. That is evidence to which I neither on this nor on any other occasion would say any implicit credit is to be given; for I think parties are very likely to make mistakes as to the date or age of handwriting; but I think that evidence extremely valuable in this respect, that there is nothing in the character of the handwriting of this entry at all inconsistent with the date which it purports to bear.

LORD CAMPBELL. — Your second witness as to the handwriting says he considers it impossible that that could be the handwriting of a person born in 1692.

LORD CHANCELLOR. — Yes, he said that certainly.

* 176 * LORD BROUGHAM. — It is in the evidence of Sir T. Phillips: “Do you think that that could be the handwriting of a gentleman of education who was born in the year 1692?” — “No, I do not think it could.”

THE LORD CHANCELLOR. — I think he said also that it might be the handwriting of a person living in 1730.

LORD CAMPBELL. — That it might be the handwriting of a person living in 1730, but not of a person born so long ago as the seventeenth century.

LORD BROUGHAM. — He is asked, “You assign to this writing a period from 1740 to 1750?” His answer is, “About the middle of last century.” To be sure a person born in 1692 might have been living in 1750; he would be only fifty-eight years of age: but he would retain the character of the writing as he learned and practised writing when a boy. I do not think this evidence is much to be depended upon.

The Solicitor-General, — It is clear that his impression was, that it was written by a person about the date he expressed; though when he was asked whether it was likely to be the writing of a person born in 1692, he might feel some doubt.

THE LORD CHANCELLOR. — I think the utmost effect of that evidence is, that it amounts to nothing further than that the writing is not inconsistent with the date.

LORD BROUGHAM. — That there is nothing on the book

which is inconsistent with the date ; but a great deal of observation arises upon the view, I think.

The Solicitor-General. — The witnesses called for this purpose are persons constantly in the habit of examining into these matters. The first of them, Sir F. Madden, stated very positively his belief that it was the writing of that period.

* LORD BROUGHAM. — I do not think Sir F. Madden * 177
a very strong witness, though he was very zealous.

The Solicitor-General. — Those witnesses could have no interest in the matter, my Lord.

LORD CAMPBELL. — Certainly not ; but then they are witnesses on one side, and I am very sorry to say that respectable witnesses are apt to form a strong bias. Those witnesses did, in my opinion, give very extraordinary evidence.

THE LORD CHANCELLOR. — He (Sir F. Madden) says, “ I see no reason to the contrary.” That is about the extent of it.

LORD BROUGHAM. — It is small testimony.

The Solicitor-General. — At all events the evidence is of this value, that those witnesses who are conversant with the writing of the time, and not only with the writing but with the appearance of the documents of the time, were of opinion on looking at this book that the writing was of the date which it purported to be, and that the entry was a genuine entry. The prayer-book may be stated to have long belonged to the family ; I am not aware of any observation arising upon the face of the book.

LORD BROUGHAM. — Will you read the entry ?

The Solicitor-General. — “ Married in Dublin, April 17th,
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1728, William, son of the Honourable Robert Tracy, late one of the English Judges, to Mary, daughter of Mr. James O'Brien, merchant."

"James Tracy, the eldest son, born January 27th, 1729."

"Timothy Tracy, the second eldest, born January 20th, 1730."

LORD BROUGHAM. — That is all written at the same time.

The Solicitor-General. — It appears so. Your Lord-
 * 178 ships * have the evidence of Mrs. Atkin; you have the affidavit of Carroll; and there is this evidence, to which I have called your Lordships' attention, as to the appearance of the writing, and of the book itself, which is produced from Mr. Tracy's possession; and it will be for your Lordships to say what weight is to be given to that testimony. The book does not stand alone, for there is another matter in evidence, the tombstone, to which there have been many witnesses.

LORD CAMPBELL. — Either the prayer-book or the tombstone would be sufficient, if the evidence of either was satisfactory.

THE LORD CHANCELLOR. — I think Mrs. Atkin never saw the book but once, and then it was put in her hand for a minute. This took place fifty-seven years ago; and when she was examined by the attorney for the claimant, she says he never produced the book to her. She never saw it till she was at the bar, and then having a glance at it, she said she thought it was the same book and the same handwriting. I think that is what she states. I am sure I should find it very difficult to speak to the identity of a book or inscription at such a distance of time.

LORD CAMPBELL. — I do not think she speaks to the identity of the book.

THE LORD CHANCELLOR. — She says it was of the same size

and colour. That is all the evidence to the identity of the book. She may be mistaken with respect to the book.

The Solicitor-General. — With regard to the other head of evidence, the inscription on the tombstone; that rests upon a great quantity of evidence admitted at your Lordships' bar.

LORD CAMPBELL. — According to the evidence at the * bar, when did this tombstone first come to the * 179 knowledge of the claimant?

The Solicitor-General. — I do not think there is any evidence of that.

THE LORD CHANCELLOR. — There was no evidence before the Attorney-General upon that tombstone.

LORD SUDELEY. — Nor any mention of it in the case in the year 1839.

LORD CAMPBELL. — As the evidence now stands, does it appear when that first came to the knowledge of the claimant?

The Solicitor-General. — I am not aware that it does, my Lord.

THE LORD CHANCELLOR. — I am quite satisfied that it does not.

The Solicitor-General. — I will call your Lordships' attention to the evidence upon that head. Your Lordships recollect a very respectable clergyman and several other witnesses, who spoke to the nature of the churchyard where this tombstone was. It appears to have been a very unprotected place, and it is in evidence that from time to time tombstones were taken away by the people of the surrounding country: a person of the name of Macavoy is particularly mentioned

as having taken away some of those tombstones for the purpose of building. We have generally very conflicting evidence upon the subject of tombstone inscriptions, as in the Leigh Peerage.

THE LORD CHANCELLOR. — There was conflicting evidence in that case, certainly.

The Solicitor-General. — A great deal. Witnesses were there called to prove that a monument existed in a particular place, and persons acquainted with the place were then called to contradict that testimony; and it is certainly * 180 worthy of observation in * this case, that when we are told of a great number of persons living round this place, rather as a reflection on our not calling any respectable witnesses, there has been no contradiction of any sort to this statement with regard to the monument. No less than seven witnesses have spoken to the inscription. It was recollected for this reason, that it was a matter which excited considerable attention that there should be buried in the churchyard of Castlebrack, in Ireland, the son of a Judge in this country. Persons having been asked to note that fact, and the inscription being impressed upon their minds, they are able therefore to state to your Lordships that they did see such a monument with such inscription at the time.

The Solicitor-General, after reading from the printed evidence the examination and cross-examination of the witnesses to the tombstone (the substance of which has been before stated); and explaining what appeared obscure or confused in their testimony, said they were all respectable persons, speaking positively on their oath to this inscription. There was no evidence given to contradict them; no attempt made even to discredit them, or to show that they were not worthy of belief. There was no discrepancy in their evidence, further than those slight differences in their recollection of the whole of the long inscription, such as proved them to be witnesses of truth. It would be, therefore, for their Lordships to say, whether they would come to

the conclusion that those witnesses, unshaken and uncontradicted, were guilty of perjury; because, if they were not guilty of perjury, they did clearly prove that there was an inscription on a tombstone in the churchyard of Castlebrack, stating that William Tracy, who is claimed * to be the ancestor of the claimant, was the son of a * 181 Judge of England; which is evidence on which any tribunal would act, finding no trace of the marriage, death, or burial of that individual in England, but finding in Ireland this evidence of a monumental inscription and record of his being the son of an English Judge. He therefore submitted, that unless the Attorney-General was prepared to offer some evidence to contradict these witnesses, the case of the claimant was made out.

LORD CAMPBELL. — Can you afford any explanation why the inscription on the tombstone was not brought forward till so late? It appears in the Attorney-General's report, which is lying on the table, and to which their Lordships will refer, that no such evidence was laid before him in 1836, nor was it brought before the House in 1838, when the first case was printed. I am most anxious to hear any explanation why this tombstone evidence was not brought forward at an earlier period of the proceedings; for some of these Tracys were living at no great distance, and this tombstone appears, according to the account of the witnesses, to have been very well known. The inscription is decisive, if genuine, and therefore one is startled at least at its not being furnished at an earlier stage.

THE LORD CHANCELLOR. — If it was talked about, it is extraordinary it was not brought forward by the family. The reason the witnesses gave for remembering it is, that it was thought an extraordinary circumstance.

LORD BROUGHAM. — So extraordinary that one of them took a copy of it thirty years ago.

LORD CAMPBELL. — The evidence would have been quite
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decisive, if satisfactory. Why, then, should it not
 * 182 * have been brought forward when the claim was made
 by the father or the son? It appears, by the Attorney-
 General's report, that the case at that time rested only on the
 prayer-book.

LORD BROUGHAM. — I am not satisfied with what the wit-
 nesses say, that the people living in the neighbourhood would
 build houses with tombstones ; I think those are the very last
 things they would take. The Irish people regard all these
 things with too much veneration to use them in that way.

THE LORD CHANCELLOR. — The claim has been depending
 more than seven years, and the tombstone is said to have
 been in existence about fifteen years ago.

LORD BROUGHAM. — And the memorandum taken by Mr.
 Tarlton is sworn to have been kept fifteen years after 1813.
 When the witness is asked, " why did you keep the memo-
 randum about the tombstone ? " he says, " because an uncle
 of mine was connected with the family."

THE LORD CHANCELLOR. — Ten years before the claim it
 was known, according to the evidence, to many persons in the
 district. It is almost impossible that it should not have
 reached the ears of these parties, if it was true. There was
 some evidence to show that there were gentlemen living in
 the neighbourhood and connected with the parish ; but no
 attempt has been made to produce them. That, it may be
 said, cuts both ways ; but in a claim of peerage, one would
 expect the very best evidence of such an inscription to be
 brought forward by the claimant, who is bound to make out
 his case. It being now brought forward, it should be ac-
 credited by persons of education and character in Ireland ;
 such evidence would have been very material. There
 * 183 was an examination as to the * names of persons of
 respectability living in the neighbourhood.

The Solicitor-General. — In the examination of the first wit-

ness, the Attorney-General for Ireland referred to such persons. From that description of examination, I thought it referred to persons whom he meant to produce. The witness Quarter is asked, "How many priests are there belonging to the chapel of Cloncundeny?—Three." Then he is asked, "Do you know any other gentleman living in the neighbourhood, who was living there twenty-five years ago?—Yes, Mr. Meredith." "Is he a gentleman?—A gentleman farmer." "Was he resident there twenty or twenty-five years ago?—Near where I live now." "When you left Castlebrack, twenty-five years ago, when you saw the tombstone, were there any gentlemen resident there who are now living?—The son of Mr. Mackavoy was there." "Is he alive still?—Yes." "Is there any other gentleman of that neighbourhood, besides Mr. Mackavoy, who was there twenty-five years ago?—There is Mr. Delany." "How near to the churchyard does he live?—Two miles, or a mile and a half?" "Did he ever go to the churchyard?—Yes." "He is still alive?—Yes."

LORD BROUGHAM. — There were in Ireland means to have got the most respectable persons, who are thus vouched to have been living there twenty-five years ago, and who, therefore, must have recollected the tombstone if it was there. One respectable man who was known in the country, some neighbouring gentleman, would have been quite invaluable.

THE LORD CHANCELLOR. — The question is, whether, in a case of peerage, we can safely act upon this; we are here as a jury.

The Solicitor-General. — I do not apprehend there is any distinction between such witnesses as are *adverted *184 to by one of your Lordships and Patrick Boyne. I should have said that he is a witness to whom his Lordship's observation would apply.

LORD SUDELEY. — Patrick Boyne mentioned several gentlemen, as Mr. Warburton and Mr. Newcombe, and others.

The Solicitor-General. — But here are these seven witnesses speaking to the fact; if any one of those respectable gentlemen living on the spot was aware of that fact being misstated, he might have been brought to contradict them.

THE LORD CHANCELLOR. — But the affirmative lies upon you.

The Solicitor-General. — My Lords, there are persons who have a strong interest in opposing this claim; and I must say it is remarkable that, if it can be met, it is not met.

THE LORD CHANCELLOR. — We know nothing of any parties. The Attorney-General appears here for the Crown, and our duty here is to advise the Crown. The case of the claimant should be made out beyond all suspicion or doubt. It is a matter in which we cannot retrace our steps. You may come again if you can mend your case; but if we come to a wrong conclusion in admitting the claim, it is final. However, the question is, whether upon your case we at present are satisfied with the evidence. I do not think there is sufficient evidence of the identity of the book: I am not convinced as to the identity of the book, depending upon the testimony of that one witness, Mrs. Atkin.

The Attorney-General. — I will satisfy your Lordship in a moment; I will not trouble you with any other evidence but that relating to that book. It is clear that Mary
* 185 O'Brien died in 1750; it is so stated * in the case printed in 1838, and her grandson (Carroll) discloses that that was the fact.

THE LORD CHANCELLOR. — But then they say that there is no certificate of burial in 1750, and there is in 1787.

The Attorney-General. — There is nothing to identify the certificate which appears on the evidence, and it is contradicted by the witness, who states that his grandmother was buried at Castlebrack in 1750, along with her husband.

The Solicitor-General. — Mrs. Atkin says that she was buried at the Round Church in Dublin.

THE LORD CHANCELLOR. — Then you produce a certificate from the Round Church ; what are the terms of it ?

The Solicitor-General. — “ Mrs. Tracy, widow.”

The Attorney-General. — There are many widow Tracys in Ireland.

The Solicitor-General. — Carroll, in his statement before the Attorney-General in 1836, states that, according to his belief, his grandmother died in 1750. Surely that can be no answer to this certificate, corroborated by the evidence of Mrs. Atkin, who has sworn positively to the fact that she was living in 1786, and died in 1787.

The Attorney-General read Carroll’s affidavit of the conversations he had heard between his mother and uncle about their family : —

“ Deponent heard them also say that their mother was buried at Castlebrack, in the Queen’s County, with their father.” That is the statement the grandson gives as the statement made in his hearing by his uncle, one of the children of William and Mary. Against this my learned friend puts in the testimony of a witness, who answers an advertisement subsequently to the case being on your Lordships’ table ; * and your Lordships will find from the * 186 particular period that it is impossible those members of the family should not know when their mother died, and where she was buried. This is the case the claimant put forward in 1836, before the then Attorney-General ; and in his old case, which your Lordships have upon your table, you will find this statement : “ William Tracy (the Judge’s son) died in 1734, and Mary his wife, late Mary O’Brien, in 1750 ; and were both buried at Castlebrack, in the Queen’s County, in Ireland.” That is the claimant’s own statement. Then he takes another gentleman to conduct the case, a very respect-

ble gentleman no doubt, who, I suppose, had not looked at this with very great attention, and who advertises for witnesses: and the statement of the claimant himself being, that Mary Tracy, late Mary O'Brien, died in 1750, and was buried at Castlebrack, this witness, whom they procured in answer to their advertisement, since the case was on your Lordships' table, tells your Lordships that she held a conversation with Mary O'Brien in the year 1786, when, according to the representation of the family, she had been in her grave thirty-six years. If my learned friend says, that all that is capable of explanation, and that the oath of the witness Mrs. Atkin is to outweigh this reputation in the family, and not one single member of the family being produced, from whom, if produced, we should elicit that the reputation of the family was that she had died in 1750;—all I will say now is, that that is one of the principal points on which I shall rely in replying to my learned friend.

The Solicitor-General.—If this is all the answer to my case, I should submit it is no ground for your Lordships not establishing this claim. The claim rests on the evidence relating to the prayer-book, * and on the evidence relating to the tombstone. I understand my learned friend to say, that notwithstanding the questions put by my learned friend the Attorney-General for Ireland, as to the names of the gentlemen residing in the neighbourhood, he does not mean to present any evidence from that part of the country to contradict any of those witnesses. Now observe, that if they are persons well acquainted with that churchyard, as, according to the statement to-day at the bar, there are such persons, and persons who have known the circumstances relating to it, men in a respectable situation of life, is it not remarkable, that so interested as some persons are in resisting this claim, there is no person brought forward for the purpose of giving any such evidence? I will not remark on the observation which fell from one of your Lordships, that the question is between the Crown and the claimant; but it is, I apprehend, an ingredient in your Lordships' judgment, that when there are parties resisting that claim, those parties have

not brought before your Lordships any evidence to contradict the case on the part of the claimant. Whenever there has been evidence of this kind adduced on behalf of a claimant, there has always been evidence to contradict such statements at your Lordships' bar, and your Lordships have had to decide between the one side and the other; but here you have these witnesses unshaken in cross-examination, untouched by any person, respectable in their station of life and general conduct, deposing to this fact at your Lordships' bar, and no sort of contradiction is offered to them, and yet your Lordships are called upon to say that you do not believe them.

With regard to the statement of my learned friend as to Carroll's affidavit, I conceive that it is of no * weight. * 188 It is a statement of tradition, made by a party many years afterwards. He says he heard it stated in the family that a certain party died in a particular year; and the whole objection to the claim is to rest on that mistake of the person making that affidavit. There is no other attempt at objection made, except by saying that the claimant makes this statement, proceeding on that affidavit, part of his printed case. The claimant only copies the affidavit; and, proceeding on it, he puts down the death of Mrs. Tracy as in 1750, because Carroll, in 1836, says she died in that year. But when you have a witness who speaks to the fact of having seen her in the year 1786, in Dublin, and to conversations with her, then are you to believe that, or to say that that witness is guilty of perjury, because a witness, who speaks from the statements of others, states his belief that she died in 1750? I humbly submit to your Lordships upon this evidence, uncontradicted, that the claimant has made out his case. We show that the William Tracy buried at Castlebrack was the son of an English Judge; and if so, supported as that is by the other parts of the case, the claimant is, I submit, clearly entitled to this peerage.

The Attorney-General again read the greater part of Carroll's affidavit of what he had heard his mother and uncle say about their family.

THE LORD CHANCELLOR. — I have heard every part of the evidence, and I do not feel that we can report to the Crown that the claimant has established his case. I am not satisfied as to the identity of the book to which the witness speaks; nor am I satisfied as to the existence of the tombstone. I should, therefore, humbly move your Lordships to re-
 * 189 solve that the * case has not been satisfactorily made out on the part of the claimant.

LORD BROUGHAM. — I entirely agree with my noble and learned friend; I do not think the evidence at all satisfactory. I do not mean to impute any perjury to Mrs. Atkin; the conversation she speaks to was fifty years ago; she never had seen this prayer-book since or looked into it until she saw it at this bar. It is a very suspicious circumstance to my mind: she swore that when she was examined by Mr. Bourdillon he did not show her the prayer-book, and that she had not seen it since the year 1786, before she was brought here. To my mind the whole matter appears extremely suspicious; and when I look at the autograph, — without having the knowledge of Sir Frederick Madden, or Sir Thomas Phillips, of handwriting, — I think there is not any thing more plain than the fact that this is a schoolboy's hand. With respect, then, to the entry in the prayer-book, in my opinion its identity is not established.

As to the tombstone, I entirely agree with my noble and learned friend; I think it is exceedingly dangerous to give credit to the evidence of these witnesses, having been brought forward at the eleventh hour and in the urgency of the case, when the case had been so long before the Attorney-General: and, under the circumstances, I do not think it incumbent upon the Attorney-General to call witnesses to disprove the existence of the tombstone, when its existence is proved only by the most unsatisfactory evidence.

LORD CAMPBELL. — I agree with my noble and learned friends that the claimant has not made out his case; and I have the strong conviction that the case is founded in
 * 190 fraud and forgery. Your Lordships will * observe that

it was necessary that the claimant should prove that the person who was undoubtedly his ancestor was the son of the English Judge. To support that there is not a particle of written evidence. From the baptismal register of William, the son of the Judge, there is no doubt the Judge had a son William ; but there is not a particle of evidence to show that William, the son of the Judge, was the ancestor of the claimant. There is neither register, nor settlement, nor will ; but, on the contrary, the will of the Judge is strong evidence to show that the Judge at that time had no son William alive ; for in that will he appears to take notice of all the members of his family, but takes no notice whatever of that William. It is suggested that William had given him offence by going to Ireland and marrying a person of obscure station in life ; but that is mere suggestion ; there is no evidence of it whatever : the mere circumstance of the Judge taking no notice of William leads to a very strong inference that William had died before his father, and not that he was then alive, and had children alive, according to the evidence which is sought to be applied to him. (a)

When the case came before the Attorney-General, it was rested wholly upon this prayer-book. Now, I should say, upon the whole appearance, this entry is a forgery ; with the degree of knowledge I have acquired of handwriting, that is the view I have taken of the subject. The person supposed to have written this is supposed to have been born in 1692. There was a witness (Sir Frederick Madden) who undertook to say that it was the handwriting of about the middle of the last century. I do not mean to throw *any *191 reflection on Sir Frederick Madden. I dare say he is a very respectable gentleman, and did not mean to give any evidence that was untrue ; but really this confirms the opinion I have entertained, that hardly any weight is to be given to the evidence of what are called scientific witnesses ; they come with a bias on their minds to support the cause in which they are embarked ; and it appears to me that Sir Frederick

(a) It was in evidence that William Tracy, the claimant's ancestor, died in 1784 ; and that Judge Tracy died in 1735.

Madden, if he had been a witness in a cause and had been asked on a different occasion what he thought of this handwriting, would have given a totally different account of it. Sir Frederick Madden and another witness, on the reference to the Attorney-General, stated their belief. Having the honour to hold the office of Attorney-General at the time this representation was made, I advised that the case should be referred to your Lordships; and now we have the evidence of Sir Frederick Madden and Sir Thomas Phillips; and they, I think, instead of their proving that this is or could be the handwriting of the person supposed to have written it, the effect of the evidence taken altogether shows that this cannot have been the handwriting of the person supposed to have written it; and I feel bound to suppose that this is an attempt to bolster up the case by a forged document. Any other evidence which there is, I must, under those circumstances, view with the greatest suspicion; for it is not enough to say that they may discard this; that they have a very good case without it.

My Lords, with reference to the other part of the case, I was anxious to know from the Solicitor-General what plausible reason could be assigned for the tombstone not being brought forward at an earlier period. It would appear that this claim, first brought forward by the claimant's
 * 192 father, has been in agitation * for ten or eleven years; it was before the Attorney-General in the year 1836, having been begun, I believe, in 1832. If there had been a tombstone with this inscription on it, it must have inevitably been known to the claimant; he would have stated its existence in the original case, and brought it forward before the Attorney-General; there is not the slightest reason given for its not being brought forward, and I cannot help coming to the conclusion that it is brought forward finally on the conviction that without it they could not succeed. It is proved in evidence that there are Tracys in that part of Ireland, but who appear to have been chiefly Roman Catholics. According to the affidavit which has been read, some of the members of this family were residing in that neighbourhood, and who, therefore, must have been aware of this inscription on the

tombstone, if it existed. I am of opinion that the evidence which has been laid before your Lordships does not establish the claim ; that it is defective ; and that the case is attempted to be supported by forgery and perjury. I have no hesitation, therefore, in concurring in the motion made by my noble and learned friend, that the claimant has not made out his case.

It was then resolved, that the chairman hath not made out his claim to the title, honour, and dignity of Viscount and Baron Tracy, of Rathcoole, in the kingdom of Ireland.

And it was ordered, that the claimant do report the said resolution to the House.

The House affirmed the resolution, and the same was reported to her Majesty.

[165]

1843.

THE FITZWALTER PEERAGE.¹

*Evidence. Proof of Handwriting. Professional Witness.
Solicitor.*

On a claim to an ancient peerage, a family pedigree, produced from the proper custody, and purporting to have been made by an ancestor of the claimant before the year 1751, was offered in evidence, on proof of the handwriting, by a witness who had been for many years inspector of franks and of official correspondence ; and who said that, from a few inspections he had of two or three other documents which were proved to be of the same ancestor's writing, he had formed in his mind such a standard of the character of his handwriting as to be able, without immediate comparison with those documents, to say whether any other document that might be produced to him was or was not in the same handwriting. *Held*, that the evidence was inadmissible.²

Held, that the claimant's solicitor, who said he had acquired a knowledge of the character of the ancestor's handwriting from having had occasion from time to time, in the course of his business for the claimant, to examine several deeds and other documents written or signed by the ancestor, and which came to the claimant together with property formerly belonging to that ancestor, was a competent witness to prove the handwriting of the pedigree.

May 9, 1843.

A POINT on the admissibility of evidence, somewhat similar to the first point in the preceding case, was decided a few days previously in another case, which is still pending before

¹ See *post*, 946.

² See *The Crawford and Lindsay Peerages*, 2 H. L. Cas. 557, 558; *Doe v. Suckermore*, 5 Ad. & El. 703 ; *Quinsigamond Bank v. Hobbs*, 11 Gray, 250; *Keith v. Lothrop*, 10 Cush. 453; *Moody v. Rowell*, 17 Pick. 490; *Sweetser v. Lowell*, 33 Me. 446; *Lyon v. Lyman*, 9 Conn. 55; *State v. Cheek*, 13 Ired. (N. C.) 114; *Northern Bank v. Buford*, 1 Duvall (Ky.), 335; *Pratt v. Rawson*, 40 Vt. 183 ; *People v. Hewit*, 2 Parker, C. R. 20 ; *Sackett v. Spencer*, 29 Barb. 180 ; *Bank of Penn. v. Haldeman*, 1 Penn. 161, 178; *Lodge v. Phipner*, 11 Serg. & R. 333.

the committee of privileges. This was the claim of Sir Brook William Bridges, Bart., to the barony of Fitzwalter, which was created by writ of summons in the year 1295, and fell into abeyance in 1756, on the death of Benjamin Mildmay, the 17th and last Lord Fitzwalter, without surviving issue.

Mr. Loftus Wigram and *Sir Harris Nicolas*, the claimant's counsel, proposed to put in evidence some family pedigrees, which were produced from the proper custody ; — no objection was made to them in that respect. They purported to have been made by * Edmund Fowler, who * 194 was proved to have died in 1751. He had stood in the direct line of the claimant's ancestors, being the father of his grandmother, one of the coheiresses to the barony, being also third son and, in the events which happened, heir of Frances Mildmay (or Fowler), who was first cousin and coheir of the said Benjamin, last Lord Fitzwalter. So that if those pedigrees could be proved to have been of the writing of this Edmund Fowler, they would be admissible in evidence for the claimant, as declarations made by a deceased relative of circumstances respecting the state of his family and immediate relatives. (a) They had been offered in evidence before the Attorney-General, on the reference of the claimant's petition to him, but were rejected for want of proof of the handwriting.

The way in which it was proposed now to prove the handwriting was this: first, by producing from the prerogative office Mr. Fowler's will — already received in evidence for other purposes — and four other documents, which were proved to be of his handwriting; namely, a confidential letter written by him to the steward of his manor of St. Clear's Hall, Essex; another letter by him, appointing a gamekeeper within that manor; a memorandum in an account book; and a deed of settlement of property comprised within the said manor. These were produced from the closet containing the claimant's family muniments, including the title-deeds of the said manor and property, which now belong to him in right of his grandmother. It was proved that the deed of settle-

(a) See *Vowles v. Young*, 13 Ves. p. 143 *et seq.*

ment had been repeatedly, and very recently, acted upon, and that all the documents had the genuine signature
 * 195 of “E. Fowler.” It was next proposed * to prove the identity of the signer of those documents with the writer of the pedigrees, by comparison of the handwriting of the latter with the signatures to the proved documents; and for that purpose, —

Mr. Lewis Silvester Clarac was examined. — He said, in answer to the questions put to him by the counsel and Lords, that he held for eighteen years the office of inspector of franks in the General Post-office; and after the abolition of the franking privilege, he had become inspector of official correspondence: that he had much experience in distinguishing the characters of handwriting, and was consulted on this matter upon important occasions. Being then asked if he had examined the signatures of E. Fowler to three of the documents, the deed, the will, and the appointment of gamekeeper, all which were produced to him, he said he had examined the signature to the will in the prerogative office twice, and looked four or five times at the signatures to the letter and other documents of Edmund Fowler, and to the handwriting of the entries in the account-book and of queries on the pedigree of the Mildmay family, at the office of the claimant’s solicitor; and he considered that, by the inspections he had made, he was so familiar with the handwriting of the person by whom these documents were written or signed, that, without any immediate comparison with them, he should be able to say whether any other document produced was or was not in the handwriting of the same person. He believed all these documents to have been signed by the same person; and he did not form his opinion merely from the signatures, but more from the general similarity of the letters, which, he said, were written in a remarkable character —

* 196 * *The Attorney-General*, having before objected to the examination of this witness, again submitted that his evidence was not receivable, not being the knowledge of handwriting acquired by a person in the ordinary course

of business, giving him a practical acquaintance with the writing of a particular person. The rule of admitting professional skill in handwriting had been carried too far, and ought not to be extended. The Courts of Law were accordingly becoming more strict. This witness was not familiar with the handwriting, which he undertook to prove, from a course of business, like a party's solicitor or steward, or like a parishioner admitted as a witness in some cases; but he had studied the handwriting for the purpose of speaking to the identity of the writer. A person who reads a medical or chemical book with the utmost attention, for the purpose of giving evidence on a question of medicine or chemistry, is not an admissible witness for such purpose.

♦ .
Mr. Wigram, being asked by the lords of the committee whether he could refer to any case in which a person who had studied handwriting for the purpose of evidence was allowed to be examined, referred to 1 Phillips on Evidence, p. 492 (7th edit.), and to 2 Starkie, p. 375 (2d edit.), and cited some of the cases mentioned in the notes to those passages. *Brune v. Rawlings*, (a) *Taylor v. Cooke*, (b) *Doe dem. Tilman v. Tarver*, (c) and *Smith v. Sainsbury*. (d) He added that Mr. Starkie, in the passage referred to, says, "Where the antiquity of the writing makes it impossible for a witness to swear that he ever saw the party write, comparison of handwriting with documents *known to be in his *197 handwriting has been admitted;" and he then in a note cites the authorities for that doctrine. But this witness goes further than actual comparison of the handwriting; for he says emphatically, that from the inspections he has had of the handwriting in the admitted documents, his mind is so impressed with the character that he is able, without immediate comparison with them, to say whether any document produced to him is in the handwriting of the same person. And that is the way in which the rule was laid down by Mr.

(a) 7 East, 283, n.

(b) 8 Price, 652.

(c) 1 Ry. & M. 141.

(d) 5 C. & P. 196.

Justice HOLROYD in *Sparrow v. Farrant* (a) and in *Maddock v. Lyne*. (b) It was material to notice that these pedigrees were old writings produced from the proper custody, and on that ground admissible, though subject to observation.

The Attorney-General. — The rule in the Court of Queen's Bench is now much more strict than it was when the cases referred to occurred, and most of them are cases at Nisi Prius and on the circuits.

The Lord Chancellor and Lord BROUGHAM, after looking into some of the cases referred to, said the pedigree could not be received on the sort of proof of the handwriting now offered.

Lord BROUGHAM added that, about five years ago, the Lord Chief Justice of the Court of Queen's Bench did him the honour to consult him on this sort of evidence; and their joint impression was, that if the cases of *Doe v. Tarver* and *Sparrow v. Farrant* — one before Lord Chief Justice ABBOTT, and the other before Mr. Justice HOLROYD — were correctly reported, they had gone further than the rule was ever carried. In the present case his noble and learned friend *198 (the *Lord Chancellor) and himself were clearly of opinion that they ought not to allow a person to say from inspection of the signatures to two or three documents, — two only, the deed and will, being genuine instruments, admitted to be in the handwriting of Edmund Fowler, — from the inspection of those two documents, that he could prove the handwriting of the party. No doubt such evidence had been often received, because it was not objected to. A witness was properly allowed to speak to a person's handwriting from inspection of a number of documents with which he had grown familiar from frequent use of them; and it was on that ground that a person's solicitor and steward were admitted to prove his handwriting.

(a) 2 Stark. Evi. 375, n. x.

(b) 1 Phil. Evi. 492, n. 1.

Mr. Wigram referred to a case of a trial at bar, *Revett v. Braham*, (a) in which an inspector of franks at the post-office was admitted to say, as a matter of skill and judgment, whether the name signed to a will was genuine or in a feigned hand —

LORD BROUGHAM. — Yes, truly ; for that is matter of professional skill. (b) But that is no reason for admitting a witness to speak to the real handwriting of a person from only having seen a few of his signatures to other instruments produced to him, and that for the purpose of proving its identity.

Mr. Bridges, who said he had been the family solicitor of the claimant for more than thirty years, and, prior to that, had been clerk to his uncle, who was the family solicitor for forty years, was then examined. Having, in answer to the questions put to him, said that he had acquired a knowledge of the character of the handwriting of Edmund Fowler from his acquaintance * with a great number of title- * 199 deeds, account-books, and other instruments purporting to have been written or signed by him, which he had occasion to examine from time to time in the course of business for his client, who now holds the Fowler estates, — he was admitted to prove the handwriting of the Mildmay pedigree ; and he said he believed and felt no doubt whatever that the whole of it was in the handwriting of Edmund Fowler, with the exception of a few words near the bottom, which he pointed out.

The pedigree and some queries to it were received as being written by Edmund Fowler, with those exceptions mentioned by the witness ; but,

The lords of the committee desired it to be understood that they were not received as proof that all the statements contained in them were true ; one of their Lordships observing that pedigrees were sometimes made to deceive, being for the most part true, except a link or two, the most material of all.

(a) 4 T. R. 497; *Marcy v. Barnes*, 16 Gray, 161.

(b) *Sed vide ante*, p. 154.

Other points of evidence that occurred in the prosecution of this claim, will be reported when the case comes to be finally settled.

1843.

Murder. Evidence. Insanity.

The House of Lords has a right to require the Judges to answer abstract questions of existing law. (a)

Notwithstanding a party accused did an act, which was in itself criminal, under the influence of insane delusion, with a view of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time that he was acting contrary to law.

That if the accused was conscious that the act was one which he ought not to do ; and if the act was at the same time contrary to law, he is punishable.¹ In all cases of this kind the jurors ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction ; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong.²

(a) See London and Westminster Bank Case, *ante*, Vol. II., p. 191.

¹ See Commonwealth v. Rogers, 7 Met. 500 ; Regina v. Higginson, 1 C. & K. 129 ; People v. Kleim, 1 Edm. (N. Y.) Sel. Cas. 13 ; People v. Divine, *ib.* 594 ; People v. Griffin, *ib.* 126 ; United States v. Holmes, 1 Clifford C. C. 98 ; Choice v. State, 31 Geo. 424 ; State v. Shipley, 10 Minn. 223 ; Willis v. People, 32 N. Y. 715 ; Smith v. Commonwealth, 1 Duvall (Ky.), 224 ; Loeffner v. State, 10 Ohio St. 598 ; Fisher v. People, 23 Ill. 283 ; People v. Hobson, 17 Cal. 424 ; Fouts v. State, 4 Greene (Iowa), 500.

² See Commonwealth v. Heath, 11 Gray, 303 ; Commonwealth v. Rogers, 7 Met. 500 ; Chase v. People, 40 Ill. 352 ; United States v. Holmes, 1 Clifford C. C. 98 ; People v. Garbutt, 17 Mich. 9 ; Boswell v. Common-

That a party labouring under a partial delusion must be considered in the same situation, as to responsibility, as if the facts, in respect to which the delusion exists, were real.³

That where an accused person is supposed to be insane, a medical man, who has been present in Court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong.⁴

May 26; June 19, 1843.

THE prisoner had been indicted for that he, on the 20th day of January, 1843, at the parish of Saint Martin-in-the-Fields, in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, in and upon one Edward Drummond, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Daniel M'Naghten, a certain pistol of the value of 20s., loaded and * charged with gunpowder and a leaden bullet * 201 (which pistol he in his right hand had and held), to, against, and upon the said Edward Drummond, feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and that the said Daniel M'Naghten, with the leaden

wealth, 20 Grattan, 860; *State v. Hundley*, 46 Missou. 414; *State v. Starling*, 6 Jones Law (N. C.), 366; *Newcomb v. State*, 87 Miss. 383; *Fisher v. People*, 23 Ill. 283. A preponderance of evidence in favour of insanity will authorize the jury to find a party insane. *Commonwealth v. Rogers*, 7 Met. 500; *State v. Klinger*, 43 Missou. 127; *State v. Hundley*, 46 Missou. 414; *People v. Coffman*, 24 Cal. 230; *Hopps v. People*, 31 Ill. 385; *Smith v. Commonwealth*, 1 Duvall (Ky.), 224; *State v. Starling*, 6 Jones Law (N. C.), 366; *Bonfanti v. State*, 2 Minn. 123; *State v. Bartlett*, 43 N. H. 224; *State v. Pike*, 49 N. H. 399; *Bradley v. State*, 31 Ind. 492.

³ See *Commonwealth v. Rogers*, 7 Met. 500; *State v. Gut*, 13 Minn. 341.

⁴ See *Commonwealth v. Rogers*, 7 Met. 500; *United States v. McGlue*, 1 Curtis C. C. 1; *Hunt v. Lowell Gas Light Co.*, 8 Allen, 169; *Woodbury v. Obear*, 7 Gray, 467; *Wetherbee v. Wetherbee*, 38 Vt. 454; *Fairchild v. Bascomb*, 35 Vt. 398; *Heald v. Thing*, 45 Maine, 392, 395, 396; *People v. Thurston*, 2 Parker Cr. C. 49; *People v. Lake*, 2 Kernan, 358; *Sills v. Brown*, 9 C. & P. 601; *State v. Windsor*, 5 Harr. 512; *Negroes Jerry v. Townshend*, 9 Md. 145; *Rex v. Wright*, R. & R. C. C. 456; *Reg. v. Frances*, 4 Cox C. C. 57; *Rex v. Searle*, 1 M. & Rob. 75; *State v. Felter*, 25 Iowa, 67.

bullet aforesaid, out of the pistol aforesaid, by force of the gundowder, &c., the said Edward Drummond, in and upon the back of him the said Edward Drummond, feloniously, &c., did strike, penetrate, and wound, giving to the said Edward Drummond, in and upon the back of the said Edward Drummond, one mortal wound, &c., of which mortal wound the said E. Drummond languished until the 25th of April and then died; and that by the means aforesaid he the prisoner did kill and murder the said Edward Drummond. The prisoner pleaded not guilty.

Evidence having been given of the fact of the shooting of Mr. Drummond, and of his death in consequence thereof, witnesses were called on the part of the prisoner to prove that he was not, at the time of committing the act, in a sound state of mind. The medical evidence was in substance this: that persons of otherwise sound mind might be affected by morbid delusions; that the prisoner was in that condition; that a person so labouring under a morbid delusion might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connection with his delusion: that it was of the nature of the disease with which the prisoner was affected to go on gradually until it had reached a climax, when it burst forth with irresistible
 * 202 * intensity; that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms.

Some of the witnesses who gave this evidence had previously examined the prisoner: others had never seen him till he appeared in Court, and they formed their opinions on hearing the evidence given by the other witnesses.

LORD CHIEF JUSTICE TINDAL (in his charge). — The question to be determined is, whether, at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong

or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.

Verdict, "not guilty," on the ground of insanity.

This verdict, and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort, having been made the subject of debate in the House of Lords, (a) it was determined to take the opinion of the Judges on the law governing such cases. Accordingly, on the 26th of May all the Judges attended their Lordships, but no questions were then put.

On the 19th of June the Judges again attended the House of Lords, when (no argument having been *had) * 203 the following questions of law were propounded to them:—

June 19.

1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

2d. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

3d. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

(a) The 6th and 13th March, 1843; see Hansard's Debates, vol. 67, pp. 288, 714.

4th. If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused ? •

5th. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any and what delusion at the time ?

* 204 * MR. JUSTICE MAULE. — I feel great difficulty in answering the questions put by your Lordships on this occasion: first, because they do not appear to arise out of, and are not put with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions; this difficulty is the greater, from the practical experience both of the bar and the Court being confined to questions arising out of the facts of particular cases; secondly, because I have heard no argument at your Lordships' bar or elsewhere on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument; and, thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the Judges may embarrass the administration of justice, when they are cited in criminal trials. For these reasons I should have been glad if my learned brethren would have joined me in praying your Lordships to excuse us from answering these questions; but as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after the very short time which I have had to consider the questions, and under the difficulties I have

mentioned ; fearing that my answers may be as little satisfactory to others as they are to myself.

The first question, as I understand it, is, in effect : what is the law respecting the alleged crime, when, at the time of the commission of it, the accused knew he was acting contrary to the law, but did the act * with a view, under * 205 the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit ? If I were to understand this question according to the strict meaning of its terms, it would require, in order to answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for their solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done ; and therefore request to be permitted to answer the question only so far as it comprehends the question, whether a person, circumstanced as stated in the question, is, for that reason only, to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding ? and I am of opinion that he is not. There is no law, that I am aware of, that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state described in the question be one which involves, or is necessarily connected with such an unsoundness, this is not a matter of law but of physiology, and not of that obvious and familiar kind as to be inferred without proof.

Second, the questions necessarily to be submitted to the jury are those questions of fact which are * raised * 206 on the record. In a criminal trial, the question commonly is, whether the accused be guilty or not guilty ; but,

in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions, as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the Judge; a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law; and if, on a trial such as is suggested in the question, he should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being, in my opinion, the law on this subject.

Third, there are no terms which the Judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the Judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.

Fourth, the answer which I have given to the first question is applicable to this.

Fifth, whether a question can be asked depends not merely on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such, that such a question as either of those suggested is proper to be asked and answered, though the witness
 * 207 has * never seen the person before the trial, and though he has merely been present and heard the witnesses; these circumstances, of his never having seen the person before, and of his having merely been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful; though I will not say that an inquiry might not be in such a state as that these circumstances should have such an effect.

Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered,

except that the witness had been present and heard the evidence ; it is to be considered whether that is enough to sustain the question. In principle it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to. Evidence, most clearly open to this objection, and on the admission of which the event of a most important trial probably turned, was received in the case of *The Queen v. M'Naghten*, tried at the Central Criminal Court in March last, before the Lord Chief Justice, Mr. Justice WILLIAMS, and Mr. Justice COLERIDGE, in which counsel of the highest eminence were engaged on both sides ; and I think the course and practice of receiving such evidence, confirmed by the very high authority of these Judges, who not only received it, but left it, as I understand, to the jury, without any remark derogating from its * weight, ought * 208 to be held to warrant its reception, notwithstanding the objection in principle to which it may be open. In cases even where the course of practice in criminal law has been unfavourable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of Parliament.

LORD CHIEF JUSTICE TINDAL. — My Lords, her Majesty's Judges (with the exception of Mr. Justice MAULE, who has stated his opinion to your Lordships), in answering the questions proposed to them by your Lordships' House, think it right, in the first place, to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case

must of necessity present themselves with endless variety, and with every shade of difference in each case ; and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your Lordships' questions.

They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your Lordships ; and as they deem it unnecessary, in this peculiar case, to deliver their opinions *seriatim*, and as all concur in * the same opinion, they desire me to express such their unanimous opinion to your Lordships.

The first question proposed by your Lordships is this : " What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons : as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit ? "

In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law ; by which expression we understand your Lordships to mean the law of the land.

Your Lordships are pleased to inquire of us, secondly, " What are the proper questions to be submitted to the jury,

where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?" And, thirdly, "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when

* the act was committed?" And as these two ques- * 210
tions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, * has been to leave the question to the jury, whether * 211
the party accused had a sufficient degree of reason to

know that he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your Lordships have proposed to us is this: "If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?" To which question the answer must, of course, depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your Lordships is: "Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime? or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?" In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes sub-

stantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

LORD BROUGHAM. — My Lords, the opinions of the learned Judges, and the very able manner in which they have been presented to the House, deserve our best thanks. One of the learned Judges has expressed his regret that these questions were not argued by counsel. Generally speaking, it is most important that in questions put for the consideration of the Judges, they should have all that assistance which is afforded to them by an argument by counsel : but at the same time there can be no doubt of your Lordships' right to put, in this way, abstract questions of law to the Judges, the answer to which might be necessary to your Lordships in your legislative capacity. There is a precedent for this course in the memorable instance of Mr. Fox's bill on the law of libel, where, before passing the bill, this House called on the Judges to give their opinions on what was the law as it then existed.

LORD CAMPBELL. — My Lords, I cannot avoid expressing * my satisfaction, that the noble and learned Lord * 213 on the woolsack carried into effect his desire to put these questions to the Judges. It was most fit that the opinions of the Judges should be asked on these matters, the settling of which is not a mere matter of speculation ; for your Lordships may be called on, in your legislative capacity, to change the law ; and before doing so, it is proper that you should be satisfied beyond doubt what the law really is. It is desirable to have such questions argued at the bar, but such a course is not always practicable. Your Lordships have been reminded of one precedent for this proceeding, but there is a still more recent instance, — the Judges having been summoned in the case of the Canada reserves to express their opinions on what was then the law on that subject. The answers given by the Judges are most highly satisfactory, and will be of the greatest use in the administration of justice.

LORD COTTENHAM.— My Lords, I fully concur with the opinion now expressed as to the obligations we owe to the Judges. It is true that they cannot be required to say what would be the construction of a bill not in existence as a law at the moment at which the question is put to them ; but they may be called on to assist your Lordships in declaring their opinions upon abstract questions of existing law.

LORD WYNFORD.— My Lords, I never doubted that your Lordships possess the power to call on the Judges to give their opinions upon questions of existing law, proposed to them as these questions have been. I myself recollect, that when I had the honour to hold the office of Lord Chief
* 214 Justice of the Court of * Common Pleas, I communicated to the House the opinions of the Judges on questions of this sort, framed with reference to the usury laws. Upon the opinion of the Judges thus delivered to the House by me a bill was founded, and afterwards passed into a law.

THE LORD CHANCELLOR.— My Lords, I entirely concur in the opinion given by my noble and learned friends, as to our right to have the opinions of the Judges on abstract questions of existing law ; and I agree that we owe our thanks to the Judges for the attention and learning with which they have answered the questions now put to them.

* WITHY v. MANGLES.

* 215

1843.

CHRISTIAN DOTTIN WITHY, Widow *Appellant.*
FREDERICK MANGLES and Others *Respondents.*

Marriage Settlement. Construction. Next of Kin. Parents and Child.

By the settlement made on the marriage of E. M., the ultimate limitation of a sum of 10,000*l.*, which her father thereby covenanted to pay, was "to such person or persons as at the time of her death should be her next of kin." E. M. died leaving her husband and a child of the marriage, and her own father and mother, surviving.

Held (affirming a decree of the Master of the Rolls), that the father, mother, and child of E. M. were equally her next of kin, and were entitled, under the limitation, to the 10,000*l.* in joint tenancy.¹

By a marriage settlement, the wife's portion was limited to her for life, remainder to her husband for life, remainder to the children of the marriage, to be vested at twenty-one or marriage, and in case none should attain that age or marry, then in trust for the brothers and sisters of the wife or their issue, as she should appoint; and in default of appointment, in trust for her next of kin.

Held, that the child of the marriage was not excluded from taking under the ultimate limitation.

Practice.

Upon appeal against a decree dismissing the bill, the respondent may, in supporting the decree, raise points in his case and argument that were not raised in the Court below.

March 30, 31; April 6; June 30, 1843.

By an indenture of settlement dated the 23d of August, 1825, and made in contemplation of the marriage of Henry Withy and Emily Mangles, it was, among other things, provided, that within six months after the death of Robert

¹ See *White v. Springett*, L. R. 4 Ch. Ap. 300; *Bullock v. Downes*, 9 H. L. Cas. 1; *Clarke v. Colls*, 9 H. L. Cas. 601; *Halton v. Foster*, L. R. 3 Ch. Ap. 505; *Stockdale v. Nicholson*, L. R. 4 Eq. 359; *In re Grylls's Trusts*, L. R. 6 Eq. 589.

Withy (the father of the intended husband), his executors should pay to the trustees of the settlement the principal sum of 5000*l.*; and that within six months after the death of James Mangles (the father of the intended wife), his executors should pay to the trustees of the settlement the principal sum of 10,000*l.*: and the trustees were to invest the two sums and pay the interest of the 5000*l.* to

* 216 * Henry Withy for life, with remainder to Emily Mangles for her life; and the interest of the 10,000*l.* to Emily Mangles for life, with remainder to Henry Withy for his life: and after the death of the survivor of them, the trustees were to hold both sums in trust for the children of the marriage, in such manner as the parents should jointly, by deed executed as therein mentioned, or the survivor of them should, by such deed or by will, appoint; and in default of appointment, for the only child of the marriage, if there should be but one, and if more than one, in equal shares; and the whole or the shares to be considered an interest vested in a son or sons at twenty-one, and in a daughter or daughters at twenty-one or marriage; and to be paid to him, her, or them, at such time or times, or as soon afterwards as the death of the survivor of the parents and other circumstances would admit; with provisions for survivorship and accruer among such children, in case of the death of any of them before that age, or marriage in case of daughters. And in case there should be no son living to attain twenty-one, and no daughter living to attain that age or be married, the trustees were to stand possessed of the two sums of 5000*l.* and 10,000*l.* upon the trusts following; that is to say, of the sum of 5000*l.* on trust for the executors, administrators, and assigns of Robert Withy; and of the sum of 10,000*l.* in trust for such of the brothers and sisters of the said Emily Mangles or any of their issue, in such shares, &c., as she should by will appoint; and in default of such appointment, upon trust for such person or persons as, at the time of the death of Emily Mangles, should be her next of kin.

The settlement contained (among other provisos and covenants not material to be mentioned) a covenant

* 217 * by Henry Withy with the trustees, in case the mar-

riage should take place, and he, in right of his wife, should become entitled to any real or personal estate under the wills of her maternal aunt and grandfather therein recited, for the settlement thereof to the same uses and purposes as were expressed concerning the sum of 10,000*l*.

The marriage was duly solemnized, and there was issue thereof one child only, born the 5th of February, 1828, and named Emilius Henry Withy. The wife died on the 8th of February, 1828, leaving the child and her husband surviving; and the child died on the 15th of the same month of February, leaving his father, and his mother's father and mother, surviving. There was no appointment made of the 10,000*l*.

Henry Withy married again in 1829, and died in 1837, leaving his second wife surviving, to whom administration of his personal estate with his will annexed was granted, the executors therein named having renounced probate.

James Mangles died in September, 1838, having by his will appointed his wife, the mother of the said Emily, and his sons, executrix and executors. The sons alone proved the will. In six months after his death, according to the provisions of the said settlement, the 10,000*l*. became payable to such person or persons as, at the time of the death of Emily Mangles or Withy, was or were her next of kin. The surviving trustees of the settlement declined to take any steps to compel payment from the executors of James Mangles. One of the surviving trustees (the respondent F. Mangles) was also one of the executors.

The appellant, the second wife of Henry Withy, having obtained administration of the estate of E. H.

* Withy, the child of the first wife, filed a creditor's * 218 bill in Chancery in 1839, against the executors of James Mangles and the surviving trustees of the settlement: and the bill, after stating the settlement and the events which happened as aforesaid, prayed, among other things, that it might be declared that, according to the true construction of the settlement, the 10,000*l*. became, on the death of Emily Withy, absolutely vested in her child, E. H. Withy, as her only next of kin at her death, subject to the

life-interest of his father H. Withy, in case he should survive James Mangles, and that the same was transmissible to the legal personal representative of E. H. Withy; and that the said sum, with interest thereon from the death of James Mangles, might be ordered to be paid out of his personal estate to the appellant, as administratrix of E. H. Withy; and that the defendants, the executors, might either admit assets of the said testator, or that the usual accounts might be taken.

The respondents, the executors of James Mangles, by their answer, submitted that, according to the true intent of the settlement and the trusts thereof, E. H. Withy did not, as the only child and sole next of kin of Emily Withy, become absolutely entitled to the said sum, subject to his father's life-interest therein; but that the said James Mangles became entitled thereto, subject to the life-interest of Henry Withy, on whose death he became absolutely entitled. And the respondents admitted assets of their testator sufficient for the purposes of the suit.

A decree was made on the hearing of the cause in July, 1840, referring it to the Master to make certain inquiries; and after the Master made his report, certifying facts before stated, the appellant filed a supplemental bill against
* 219 Mrs. Mangles, widow of * James Mangles and mother of Emily Withy. She put in an answer similar to that of the executors, and she thereby claimed such interest in the 10,000*l.* as, according to the true construction of the settlement, and in the events which happened, she might, in the judgment of the Court, be entitled to.

Lord LANGDALE, M. R., before whom the cause again came to be heard, on further directions and on the Master's report, together with the supplemental cause, dismissed both bills with costs; holding that, under the ultimate limitation in the settlement, the child and the father and mother of Emily Withy were equally her next of kin at the time of her death, and as such were entitled to the said sum of 10,000*l.* in joint-tenancy, subject to the life-interest of Henry Withy, in case he survived James Mangles; and that the child having died

first and without severance of the joint interest, the appellant, as his personal representative, took no interest in the fund, the whole of it having then belonged to the surviving joint-tenants. (a)

The plaintiff appealed from that decree.

Mr. Tinney and *Mr. Pemberton*, for the appellant. (b) — The settlement in this case did not expressly provide for the event, which has occurred, of the wife's dying without having made any appointment of the trust property, leaving a child, who died before the property vested in him. The main question which arose in that event, and which has been decided by the Master of the Rolls, is of the utmost importance; and it certainly must be taken against the correctness * of that decision, that this is the first time * 220 in the law of England that the parents of an intestate have been put in competition with the child, and held to take, as joint-tenants with the child, property limited to the next of kin of the intestate; and, on the child's dying before severance, to take the whole property. His Lordship, in his judgment, which, although now impugned, must be admitted to be a well-considered and elaborate judgment, says, (c) the consideration is, what has been understood by the law of England to be the meaning of the term "next of kin," taken simply and without reference to the Statute of Distributions; (d) and he lays down this proposition in clear terms, that, unless the plaintiff can show that the child was nearer of kin to the intestate than the intestate's parents, the child is not entitled, under this limitation, to take in exclusion of, or preference to, the parents. It was argued for the plaintiff in the Court below, as it must be argued here, that by the law of England, without any reference to the statute, the descendants of any proposed person dying intestate are his next of kin, entitled not only to administration, but also to succession to his personal estate, in exclusion of all ascendants or collaterals: that is the proposition of law which the

(a) 4 Beav. 364.

(b) *Mr. Geldart* was on the same side.

(c) 4 Beav. 365 *et seq.*

(d) 22 & 23 Chas. 2, c. 10.

appellant has to maintain ; and the question to be decided by it is, whether, on the death of Emily Mangles or Withy, leaving a child surviving, that child was her next of kin, or her father and mother were her next of kin with and equally as the child.

Lord COKE says, in *Hensloe's Case*, (a) that “ when a man died intestate, before the Statute 31 Edw. 3, c. 11, the
 * 221 King, who is *parens patriæ*, used by his ministers * to seize his goods, to the intent that they should be preserved and disposed of for his burial, for payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood : ” that afterwards, that care was committed to the Ordinary, who was for that purpose constituted in *loco parentis*, and might commit the administration of the intestate's estate to another ; and by the Act 31 Edw. 3, c. 11, he was compellable to commit it to “ the next and most faithful friends ” of the intestate, not under any disability : that the Act of 21 Henry 8, c. 5, introduced the further alteration of giving power to the Ordinary to commit administration “ to the wife of the intestate, or to the next of blood, or to both.” Then, for the first time, the term “ next of blood,” synonymous with “ next of kin,” came to be used. Now we shall see what persons fall under that description.

Dr. Godolphin, in his “ Orphans' Legacy,” commenting on those Acts, and on the practice that had obtained under them, says : (b) “ By the law, both by the statute laws, the common law, and by the civil law, the nearest of kin to the deceased intestate is to succeed in the administration of his goods : as, first, the husband or wife ; but if they fail, then, secondly, the children, whether male or female ; but if they fail, then, thirdly, the parents, whether father or mother ; but if they fail, then, fourthly, the brothers and sisters,” &c. “ There are but three orders or degrees chiefly of kindred, which the civil law doth specially take notice of : the first is in the right line descendent, as children, grandchildren, and so downwards. The second is the right line ascendent, as
 * 222 * parents, grandparents, and so upwards.” And again,

(a) 9 Rep. 38.

(b) Part 2, c. 33, p. 256 *et seq.* (2d edit. 1677).

“ They are, in the first place, admissible to such administration (of an intestate’s goods) who are of the right line descendent from the deceased ; so that if a man die intestate, leaving behind him children, parents, and collateral kindred, the children do, in the first place, succeed as to the goods whereof he died intestate,” &c.

In Toller’s Law of Executors and Administrators, it is said : (a) “ Of the kindred, those we must recollect are to be preferred who are the nearest in degree to the intestate ; but from among persons of equal degree, in case they apply, the Ordinary has the power of making his election. Of the next of kin then, first the children, and on failure of them, the father of the deceased, or if he be dead, the mother is entitled to administration. The parents, indeed, as well as the children, are of the first degree, but the children are allowed the preference.”

Sir W. BLACKSTONE, referring to Coke and Godolphin, says : (b) “ The Statute 31 Ed. 3, c. 11, provides, that in case of intestacy, the Ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods ; and the ‘ next and most lawful friend ’ is interpreted to be the next of blood that is under no legal disabilities. The Statute 21 Hen. 8, c. 5, enlarges a little more the power of the Ecclesiastical Judge, and permits him to grant administration either to the widow or the next of kin or to both of them, at his own discretion ; and where two or more persons are in the same degree of kindred, gives the Ordinary his election to accept whichever he pleases.” And he observes afterwards, (c) “ that among the kindred, * those are to be preferred that are the nearest in * 223 degree to the intestate ; ” and “ that this nearness or propinquity of degree shall be reckoned according to the computation of the civilians, and not of the canonists.” “ And therefore, in the first place, the children, or (on failure of children) the parents of the deceased, are entitled to the administration ; both which are indeed in the first degree,

(a) Page 90 (5th edit. 1822).

(b) 2 Comm. 496.

(c) 2 Comm. 504.

but with us the children are allowed the preference." To this passage is appended a note, stating that there was a long dispute in Germany whether a man's children should inherit his effects during the life of their grandfather; that at last it was agreed, at the Diet of Arensberg, that the point should be decided by combat; and the champions of the children having obtained the victory, the law was established in their favour, that the issue of a person deceased should be entitled to his goods and chattels, in preference to his parents.

In Mr. Burge's Commentaries on Colonial and Foreign Laws are these passages: (a) "The civil law of succession admitted three classes of successors, — descendants, ascendants, and collaterals. The descendants were first entitled, then ascendants," &c. "The children of the deceased were preferred to either ascendants or collaterals." And "although the father and son are distant from the deceased in equal degree, yet it has been seen that the son is preferred." "The descendant entirely excludes the ascendant; and thus the great-grandson, who is of the third degree, excludes the father, who is of the first." "But on failure of descendants of the deceased, the father and mother are next called to the succession."

* 224 * In Burn's Ecclesiastical Law, under the title "Distribution," it is said, (b) "Kindred are distinguished by the right line, and by the collateral. The right line is of parents and children, computing by ascendants and descendants." "Those of the right line are reckoned upwards as parents, or downwards as children." "Every generation, whether ascending or descending, constitutes a different degree. Thus, the father of John is related to him in the first degree, and so likewise is his son." After setting forth part of the first chapter of the 118th Novel, "If a person dieth intestate, leaving a descendant of either sex, or of whatsoever degree, such descendant is to be preferred to all ascendants and collaterals," &c., Dr. Burn adds, "And herein the civil, canon, common, and statute laws do all agree, in giving this

(a) Vol. 4, c. 2, pp. 31, 31, 37.

(b) Vol. 4, p. 539 (9th edit.).

preference to descendants, exclusive of all ascendants and collaterals." (a)

Thus, it appears that there is a wonderful concurrence, if not an identity, of opinions among all the commentators and text-writers of authority, that although the father and child of an intestate are equal in proximity of blood to him, the law of England prefers the latter in the succession to the intestate's personal estate. Indeed, the respective degrees in which a person is of kin to an intestate, are important only when the claimants to the succession are in the same line; if they are in different lines, the line is the first consideration, the degree is only of secondary consideration; and accordingly, even a great-grandson, who is in the third degree, excludes a father, who is in the first —

[LORD CAMPBELL. — And so strict is that rule of the law of England, that while there is any one, ever so *remote in the descending line, you cannot have *225 recourse to the ascendants, however near.]

That is the rule of law, irrespective of the Statute of Distributions; and cases which arose on claims to administration under that statute show that the rule still prevails as between descendants and ascendants in the same degree: as in *Smith's Case*, (b) where administration was refused to the father of an intestate, who left an infant son surviving. In *Blackborough v. Davis*, (c) where a contest arose between a grandfather and an aunt of an intestate, Lord HOLT, taking an elaborate view of the law on this subject, says that, "by the law of England, before the Conquest, all the descendants of a person dying intestate had preference, not only in personal but also in real estates." Then, after mentioning that an alteration was made as to real estates, he proceeds: "And personal estates were left as they were; and father and mother, as to that, have preference to brother or sister of the intestate, and all other relatives except the descendants

(a) Vol. 4, p. 544 (9th edit.).

(b) *Strange*, 892.

(c) 12 Mod. 615; see pp. 623, 624; 1 P. Wms. 49.

of him: and it is plain that this remains so still, for that nothing appears in the books of any alteration made in this point."

By the 3d section of the Statute of Distributions, the Ordinary shall order and make just and equal distribution of what remains after all debts, &c., amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases," &c. And by section 5, the manner of

distribution is more particularly directed; that is, one-
* 226 third of the surplusage to the wife of the intestate, * and

all the residue by equal portions to and amongst the children, and such persons as legally represent them: and by sections 6 and 7, in case there be no wife nor children, nor legal representatives of children, the residue is distributable amongst the next of kindred of the intestate who are in equal degree, and their legal representatives; but no representation is admitted among collaterals, after brothers' and sisters' children. Lord HARDWICKE, on the construction of these sections, in the case of *Evelyn v. Evelyn*, (a) held that a grandfather does not share with the brother of an intestate; that whether the degrees of proximity were to be computed by the common law or by the civil law, there were strong grounds for preferring the brother to the grandfather: because, first, of persons in equal degree, one may be preferred "*si ejus jus sit potius*;" secondly, that the preference of the younger person, in whom there is a natural *spes accrescendi*, is favoured by utility and public policy; and lastly and chiefly, because there were two former decisions on that side; viz., *Poole v. Wilshaw*, in 1708, and *Norbury v. Vicars*, in 1749. Upon all these grounds, the child of the intestate, in the present case, ought to be held entitled to a preference over the intestate's parents; and the appellant asks that the same interpretation may be now put upon the words "next of kin" that was put on them before the Statute of Distributions —

(a) Amb. 191; 3 Atk. 762; 4 Burn's Ecc. Law, p. 548 (9th ed.).

[LORD COTTENHAM. — It does not appear, by the report of this case, that *Evelyn v. Evelyn* was cited before the Master of the Rolls.]

The omission must be a mistake; it was cited and much relied on; and the words *jus potius*, used by the Master of the Rolls in his judgment, are taken from the * judgment of Lord HARDWICKE, who seemed to agree * 227 in the opinion of the commentator Vinnius, that among kindred in equal degree one may have a *jus potius*.

[LORD COTTENHAM. — Lord HARDWICKE's decision proceeded on the computation of the degrees by the common law, that between brother and brother there was but one degree, whereas the grandfather was in the second degree; so that case does not help the argument for the appellant.]

He distinctly says that “ the computation of degrees ought to be according to the rules of the civil law.” If the decision was on the ground that the brother was in the first degree of proximity, it would go to admit a brother to share with the father of an intestate; of which there is no instance.

[LORD COTTENHAM. — There can be no doubt, on referring to the report, that the decision proceeded on the common-law computation. He states the case of *Poole v. Wilshaw*, that it was a bill by the grandmother for a share of her grandson's estate equally with his brother, insisting that she was in equal degree of consanguinity, and equally entitled; but all the Court was contrary, and there was no such usage since the statute. And he adds, that he knew of none since; and that as the subsequent decree at the Rolls (in *Norbury v. Vicars*) was conformable, he would not overthrow these determinations.]

In cases of intestacy the Ecclesiastical Courts have always, as well since as before the Statute of Distributions, considered themselves bound in grants of administration to prefer the

child to the father of the intestate, *Crooke v. Watt*; (a) and the reason, no doubt, is, that the child has a *jus potius*,
 * 228 though both are in * equal degree of propinquity to the intestate; and for the same reason the father is preferred to the brother of the intestate. Administration also follows an interest in or a right to the intestate's property; *In re Gill*; (b) it would, therefore, seem that a right to the administration determines in most cases the right to the property, *et vice versa*. In the limitation of personal property to one's heir, there is no doubt it would go to his next of kin, and his child, answering both descriptions, would take. *Holloway v. Holloway*. (c) And so would the child be held entitled under a limitation of real estate to the next of kin. Mr. Jarman, in his *Treatise on Wills*, says (2 vol., p. 37), — not referring to any authority, but assuming that the terms “next of kin” are well understood, — “a devise or bequest to next of kin vests the property in the persons (exclusively of the widow) who would take the personal estate in case of intestacy, under the Statutes of Distribution; subject, however, to this material qualification, that it is confined to those who answer the description of next of kin properly so called, to the exclusion of persons who claim by representation, under the express clause in the Statute of Charles 2.” He then states the case of *Elmsley v. Young*, (d) adding that the final decision on it by the Lords Commissioners, holding, “that the trust there applied to the next of kin in the strictest sense of the term, to the exclusion of the persons claiming by representation,” was sanctioned by the previous opinions of Lord THURLOW, in *Phillips v. Garth*, (e) by Lord ELDON, in *Garrick v. Lord Camden*, (g) and by Sir W. GRANT, in *Smith v. Campbell*; (h) contrary to the *dictum* of Lord
 * 229 * KENYON, in *Stamp v. Cooke*; (i) and to the decisions of Mr. Justice BULLER, in *Phillips v. Garth*; (k) and

(a) 2 Vern. 125.

(b) 1 Hagg. 342.

(c) 5 Ves. 398.

(d) 2 My. & K. 780.

(e) 3 Bro. C. C. 69.

(g) 14 Ves. 372.

(h) Coop. 217.

(i) 1 Cox, 234.

(k) 3 Bro. C. C. 64.

of Sir J. LEACH, in *Hinckley v. Maclarens* (a) and *Elmsley v. Young*. (b)

The Statute of Distributions does not at all form the criterion of the child's claim to preference ; it does not alter or affect the degrees of propinquity ; what it does is to introduce the principle of representation among descendants and collaterals, introducing persons as next of kin who are not next of kin, but leaving the nearest of blood as they were before. The law of England, anterior to the statute, preferred the children to the parents of the deceased person. Why ? Because the children were deemed to be properly the next of kin ; so that the term " next of kin " is not governed merely by proximity of blood. In *Elmsley v. Young*, Lord Commissioner SHADWELL says, (c) " It was said that the term next of kin means, by force of its own natural import, the persons who take as next of kin by the Statute of Distributions ; but that this is not so, is manifest upon the face of the statute itself ; " and after reading the 6th section, which directs the remainder of the intestate's estate, in the events there mentioned, to be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them, his Honor adds, " so that the statute does emphatically, in directing a distribution in a particular case, take notice that the persons who are to take shall be the next of kin, and some other persons besides the next of kin, of the intestate." " It is by no means true, as a general proposition, that the term next of kin is * taken to signify those who are entitled un- * 230 der the Statute of Distributions." And in the same case Lord Commissioner BOSANQUET, in his judgment, referring to Mr. Justice BULLER's decision in *Phillips v. Garth*, says, (d) " How and when and to what extent did the words ' next of kin ' acquire any particular meaning distinct from their known legal meaning ? That before the statute the meaning of those words is clear and intelligible, and that there was no difficulty in applying them, as they had been

(a) 1 My. & K. 27.

(b) 2 My. & K. 82.

(c) 2 My. & K. 786.

(d) 2 My. & K. 791.

applied on former occasions and according to the language of Lord COKE, to the next of blood, there can be no doubt. How then did they acquire a different meaning, and how can that meaning be applied to an instrument which does not profess to relate to the Statute of Distributions ? ”

[LORD COTTENHAM. — Your contest in the present case is, that the parent of the deceased is not of equal degree with the child ; not equally next of kin with the child. How does *Smith's Case*, cited from Strange's Reports, sustain that ?]

The Ecclesiastical Court refused administration to the father, because he was not next of kin, but the intestate's child, who, being an infant, could not obtain it. If the child was out of the way, the father would be entitled ; so that he was not deemed equally next of kin with the child.

[LORD CAMPBELL. — That case does not decide whether the father or child of an intestate has the better title to his property ; but that the child, if of age, would be entitled to the administration.]

Precisely so ; and that is the present case.

[LORD COTTENHAM. — If the child was out of the
* 231 way, * administration would be granted to the intestate's father. But it is not the course of the Ecclesiastical Court to grant administration, *durante minori ætate* of the person entitled thereto, to the person who would be next entitled. The contest was not between the child and grandfather, as in this case, but whether the grandfather was entitled to the administration *durante minori ætate* of the child.]

The grandfather claimed the administration to his deceased son, as of right.

The second question in this case was decided by the Master of the Rolls in favour of the plaintiff, and will not, perhaps, be again disputed by the respondents. That question is,

whether, under the ultimate limitation to the next of kin of Emily Mangles or Withy, her child was excluded from any benefit, upon the intention of the settlement, which contained antecedent provisions for the issue of the marriage; and it was only in default of issue living to attain twenty-one or marry, that the limitation to the next of kin of the wife was to take effect. There are cases, as *Bailey v. Wright*, (a) in which, under a limitation in a marriage settlement of the wife's property for her next of kin or personal representative in default of her appointment, the husband was held to be excluded on the intention. That case is in many respects different from this case, to which the reasons in the Lord Chancellor's judgment (b) cannot in the least apply. But the judgment of the Lords Commissioners in *Elmsley v. Young*, (c) which was approved of by their co-commissioner, the late Lord Chancellor, and by the present Lord Chancellor of Ireland, (d) is decisive that the child was not excluded from the benefit of the * ultimate limitation in * 232 this case. *Pearce v. Vincent* (e) is also decisive.

There the Barons of the Exchequer, in a case sent by Sir J. LEACH, certified their opinion that the tenant for life under a devise in a will was not excluded, but took the real and personal estates absolutely, under a limitation "to the next and nearest relation, or nearest of kin," of the testator. (g) Sir J. LEACH, being dissatisfied, sent the same case for the opinion of the Judges of the Court of Common Pleas, who returned the same answer, (h) which was adopted by the present Master of the Rolls. (i) The law, therefore, may be considered as settled by these decisions, that a person cannot, on the general intent of a settlement or will, be excluded from the benefit of an ultimate limitation, if he answers the description. In this case, therefore, it is submitted that the judgment of the Master of the Rolls on the minor point was right, but on the main question erroneous, introducing for

(a) 18 Ves. 49.

(c) 2 My. & K. 780.

(e) 2 My. & K. 800.

(h) 2 Bing. N. C. 328.

(b) 18 Ves. 55.

(d) 2 Dru. & W. 113.

(g) 1 C. & M. 598.

(i) 2 Keen, 230.

the first time a new principle of law on the construction of the well-known terms "next of kin," and importing most calamitous consequences into existing and perhaps future settlements. By the settlement in this case the property was settled for the benefit of Emily Mangles and her children; but by the decision, not only the 10,000*l.*, her portion, which her father covenanted to pay to the trustees, but also other property coming to her under the wills of her maternal relations, being settled in the same way, are all to go to her surviving parent. That decision is erroneous.

Mr. Kindersley and *Mr. Humphrey*, for the respondents. —

Before we come to the main question in this case, let
 * 233 us consider the minor points which the Master * of the
 Rolls decided against us. It appears clearly on the face of the settlement that it was the intention of the parties to exclude from its express provisions for children—in default of appointment by the husband or wife—any child that should not acquire a vested interest in the settled property. In the first provision for children, in default of appointment, they, if more than one, or if only one, were to take in equal shares, to be considered an interest vested in each at the age of twenty-one years if a son, and at that age or marriage if a daughter; and if any child, there being more than one, should die before that age, or marriage if a daughter, that child's share was to belong to the survivors in equal shares, to be vested in them at the time their original shares should vest; and if there should be no child, or none to live to attain twenty-one or to marry, the trustees were to hold the sum of 10,000*l.*—in default of appointment by Emily Mangles among her brothers and sisters—upon trust for such person or persons as at her death should be her "next of kin." Now here is a contingency with a double aspect, if the construction put on these terms for the appellant is right. By the express provisions for children, in all supposed events, no child was to take an interest before twenty-one or marriage; but according to the appellant's interpretation of this limitation to next of kin, a child was to take before that

time. Could that be the intention of the settlement which is said, in *Woodcock v. The Duke of Dorset*, (a) to be "the truth and honour of the case"? *Bailey v. Wright*, (b) *Cholmondeley v. Clinton*, (c) *Bird v. Wood*. (d) Standing upon the intention, and looking to the preceding limitations

* for children of the marriage, we submit that by the * 234 terms "next of kin," in the ultimate limitation, are meant persons answering that description other than children of the marriage, persons not comprised in the preceding limitations expressly providing for such children in all events in which it was intended they should take; and that the ultimate limitation to the next of kin, being a substitution on failure of the preceding limitations, must be taken to be for the benefit of persons not contemplated by them.

In support of the argument for the appellant, that the child was not excluded, the cases of *Elmsley v. Young* (e) and *Pearce v. Vincent* (g) were relied on, in each of which the tenant for life was held to take the benefit of the ultimate limitation to the next of kin. Those cases were materially different from the present case; and in the latter, Sir J. LEACH retained his original opinion that the tenant for life was excluded, notwithstanding the opinion of the Court of Exchequer to the contrary, (h) and sent the case to the Court of Common Pleas, (i) whose certificate concurring with that of the Court of Exchequer, the present Master of the Rolls confirmed, being anxious to put an end to litigation. In both cases the parties, declared to be entitled under the ultimate limitation, took only partial interests under the preceding limitations; but in the present case, the child, had he lived to attain a vested interest under the preceding limitations, would take absolutely. The case of *Holloway v. Holloway*, (k) also cited for the appellant on this point, was one of doubtful application; for although that case was recognized by Sir W. GRANT in *Jones v. Colbeck*, (l) * 235

(a) 3 Bro. C. C. 568.

(c) 2 Jac. & W. 1.

(e) 2 My. & K. 82, 786.

(h) 1 Cr. & M. 598.

(k) 5 Ves. 399.

(b) 18 Ves. 49.

(d) 2 Sim. & Stu. 400.

(g) 2 My. & K. 800; 2 Keen, 230.

(i) 2 Bing. N. C. 328; 2 Scott, 347.

(l) 8 Ves. 39.

yet in *Briden v. Hewlet*, (a) in which both these cases were urged, Sir J. LEACH held that the mother, tenant for life, was excluded from the benefit of the ultimate limitation "to such persons as should be entitled under the Statute of Distributions," and he followed his own judgment in the previous case of *Bird v. Wood*, (b) which was a case of direct exclusion. In *Jones v. Colbeck* there was a residuary bequest to the testator's daughter for life, and to her children at their ages of twenty-one, and after the death of the daughter and her children under that age to the testator's relations in a due course of administration; the daughter surviving the testator was his only next of kin at his death, and she died without leaving issue. Her personal representatives were excluded from the residuary bequest, and the testator's relations (held to be synonymous with next of kin) living at her death were declared entitled. In *Miller v. Eaton*, (c) in a gift of residue to the testator's next of kin, his next of kin living at his death, having express bequests under the will, were excluded. In *Clapton v. Bulmer*, (d) in a gift of residue in trust for testator's daughter for life, and after her death for her children, and if she should die without leaving issue, for "the nearest of kin of the testator's family;" the daughter surviving the testator was his sole next of kin; on her death without issue, her personal representative was excluded from any share in the residue, and her next of kin at her death, being also then next of kin of the testator, was held entitled; and that decision was on appeal affirmed by the Lord Chancellor. (e) These were all cases of

* 236 probable intention of exclusion * on the construction of wills; but it appears from *Woodcock v. The Duke of Dorset*, (g) in which the observation that the intention of "the settlement is the truth and honour of the case" first occurred, that there is no difference between the rules of construction of deeds of settlement and of wills. *Watt v.*

(a) 2 My. & K. 90.

(c) Coop. 272.

(e) 5 My. & Cr. 108.

(b) 2 Sim. & Stu. 400.

(d) 10 Sim. 426.

(g) 3 Bro. C. C. 568.

Watt, (a) Bailey v. Wright, (b) Bulmer v. Jay, (c) Wright v. Kemp. (d)

Another point on which the respondents in this case rely is, that as all the trusts declared by the settlement concerning the sum of 10,000*l.*, preceding the ultimate trust for the next of kin of Emily Mangles, who are mere volunteers, had failed before the death of James Mangles, and therefore before the 10,000*l.* became payable, a Court of Equity will not enforce that limitation in their favour. The question is, therefore, whether the plaintiff is a volunteer.

Mr. Tinney objected to any argument on this point in the appeal, as it was not raised in the Court below. In appeals, which differ from rehearings in this respect, the object is to see whether the Court below decided rightly on points raised there.

The respondents' counsel admitting that this point was not raised below, said they thought it their duty not to omit it on appeal; and it was accordingly noticed in the reasons in their printed case.

Lord COTTENHAM, after conferring with the learned Lords present, said it was their opinion that the point might be properly raised on the appeal. The bill was dismissed below, and the respondents, anxious to uphold the decree, were for that purpose entitled to urge this point in their argument.

* The respondents' counsel then proceeded to argue * 237 that the appellant claiming as the personal representative of the child under the limitation to the next of kin of the mother, being no relation at all of either the child or mother, was a mere volunteer, and that a Court of Equity would not lend its assistance to a volunteer claiming the benefit of a settlement. *Bellingham v. Lowther, (e) Osgood v. Strode, (g)*

(a) 3 Ves. 244.

(b) 18 Ves. 49.

(c) 4 Sim. 48; on appeal, 3 My. & K. 197.

(d) 3 T. R. 470.

(e) 1 Chan. Cas. 243.

(g) 2 P. Wms. 245.

Pulvertoft v. Pulvertoft, (a) *Johnson v. Legard*, (b) *Lomas v. Wright*, (c) *Godsal v. Webb*, (d) *Jeffreys v. Jeffreys*. (e) The case of *Ellis v. Nimmo*, (g) in the Court of Chancery in Ireland, was, so far as it was inconsistent with this principle, questioned by the Vice-Chancellor in *Holloway v. Headington*, (h) and overruled by the Lord Chancellor in *Dillon v. Coppin*. (i) Neither will an action at law lie here ; because F. Mangles, a surviving trustee of the settlement, is also one of the executors of the covenantor James Mangles, and cannot, as trustee, bring an action for the 10,000*l.* against himself as executor.

We now come to the last and main question in this case, and submit with confidence that if the child of Emily Mangles, in the events that happened, be not entirely excluded from the ultimate trust, yet the words of that trust do not designate such of her next of kin as would be entitled to her personal estate, according to the Statute of Distributions, (k) in case she had died intestate ; but the person or persons who should be her next or nearest of kin, without reference to

that statute or to any other law regulating the distribution * of, or succession to, intestates' effects, and

without any distinction or preference whatever among such persons. And in that view, the only true view, of the ultimate trust, the parents of Emily Mangles having, as well as her son, survived her, were, together with the son, her next and nearest of kin ; and her son being therefore entitled only jointly with her parents, and having died in their lifetime and without severance of the joint interest, the whole sum of 10,000*l.* belonged to the parents ; and the appellant, claiming as the representative of the son, is not entitled to any part of it.

It is clear that this question depends upon, and must be decided by, the law of consanguinity, which is defined to be

(a) 18 Ves. 84.

(b) 3 Madd. 283; 1 Tur. 281.

(c) 2 My. & K. 769.

(d) 2 Keen, 99.

(e) 1 Cr. & Ph. 138.

(g) Lloyd & G. Cas. temp. Sugd. 333.

(h) 8 Sim. 324.

(i) 4 My. & Cr. 647.

(k) 22 & 23 Car. 2, c. 10.

“vinculum personarum ab eodem stipite descendentium,” and is lineal or collateral. (a) Every generation in the direct line of consanguinity constitutes a different degree, reckoned either upwards or downwards. The father of John Stiles is related to him in the first degree, and so likewise is his son; his grandfather and grandson are related to him in the second degree. This is the natural mode of reckoning the degrees of kindred in the direct line, and therefore obtains universally, as well in the civil and canon as in the common law. The preference of the child to the parent of an intestate, in the succession to his personal estate and in the grant of administration, both founded upon considerations of convenience and policy, does not prove that the child is nearer of kin than the parent. There is no more reason for importing into the law of consanguinity the law of succession to personal property than there is for importing into it the law of succession to real * estate. In England * 239 there are three kinds of law perfectly distinct from one another, — the law of succession to personal estate, the law of inheritance or succession to real estate, and the law of consanguinity; besides gavelkind and other local laws. By the common law of England, as far back as, or even before, the Conquest, the children and widow of a deceased person took, before all others, their shares in his personal estate; not because they were nearest of kin to him, but because it was reasonable, and therefore they had their reasonable parts. (b) His goods were to be divided into three equal parts; one to go to his children or lineal descendants, one to his wife, and of the third part he might dispose by will; or if he died without a wife, he might dispose of a moiety of the whole; the other moiety went to his children. That was the general law in the reign of Edward 3, — long prior to the law of succession *ab intestato*, — though afterwards restricted to the city of London, province of York, and principality of Wales. It does not appear that the deceased’s parents took any share in the succession.

(a) 2 Blacks. 202; Harr. Just. Inst. tit. 6, 7, *ad finem*.

(b) 2 Blacks. 492 *et seq.*

The grants of administration were entirely arbitrary, until by the Statute of 21 Henry 8, c. 5, the Ordinary was compelled to grant it “to the next and most lawful friend of the deceased;” under which description the husband became entitled to administration to his deceased wife, though not of kin to her at all. (a) He had also the beneficial interest in his wife’s property; and it is the practice of the Ecclesiastical Courts to let administration go with the beneficial interest, as

far as that can be done. *Thomas v. Buller*, (b) *Carter* • 240 *v. Crawley*, (c) *Crooke* • *v. Watt*, (d) *In re Gill*. (e)

Hence springs up a usage in the Ecclesiastical Courts, which, being originally founded on convenience, becomes the law of those Courts. By that law the children of an intestate being in the descending line, are preferred to the parents and to all in the ascending line; not as of absolute right, or because they are nearer in blood to the intestate than his parents, but the rule is founded on polity and general abstract reason. *Blackborough v. Davis*, (g) *Evelyn v. Evelyn*. (h) But neither the law of succession to property nor the law regulating administration is the foundation of the law of consanguinity, which is a distinct original law, and must govern the question in this case. In the ordinary meaning of the terms “next of kin,” what is “next” but nearest? What is kin or kindred, but relatives? What reference can the terms “nearest relations” have to succession *ab intestato* to Emily Mangles? The terms “next of kin” have no reference to intestacy or to succession, as the term “heir” has, for that implies succession. In the interpretation of “next of kin” in this case, the Statute of Distributions is rejected altogether, and reference must be made to the rules of law prior to and *dehors* that statute. The cases of *Brandon v. Brandon* (i) and *Elmsley v. Young* (k) establish this principle, that where there is a gift to the next of kin, *simpliciter*, no regard is to be had to the Statutes of

(a) Rolle’s Abr. tit. Adm. 200.

(b) Vent. 217–19.

(d) 2 Vern. 125.

(g) *Ubi supra*, p. 225.

(i) 3 Swanst. 319.

(c) Sir T. Raym. 496.

(e) 1 Hagg. Ecc. Rep. 342.

(h) *Ubi supra*, p. 226.

(k) 2 My. & K. 82, 786.

Distribution, that is, to the law of succession *ab intestato*, but to the law of consanguinity. All the respondents ask the House to do is to apply to this case the principle of construction established by those cases, and to * de- * 241
clare, upon the meaning and reason of the words and the general law, without reference to the statute, whether a child is nearer in blood to his parent than that parent's parents. That is the simple proposition which the appellant is bound to prove, in order to get this judgment reversed. If by the general law before the Statute of Distributions the children of an intestate were the sole next of kin, the legislature had only to say in the statute that the residue of the property, in the events there mentioned, should go to the next of kin. But the statute shows the sense of the legislature that there were other persons as near of kin as the children; and to prevent competition between them and the children, under that description, the cumbrous machinery in the fifth, sixth, and seventh sections is resorted to; because unless the residue was given to the children *eo nomine* other persons would claim to share with them as next of kin. There can be no doubt that the parents and children of any person are his next of kin in equal degree, not only in the natural and ordinary meaning of the expression, but also as recognized in the law of England; and where the expression occurs simply and without addition, as in this case, it must be taken in its primary and natural sense, without any reference to the laws of inheritance or succession. The question being one of proximity, that is, which of two objects equidistant from the intermediate subject is nearer to it, no one can answer; and therefore the judgment of the Court below, treating them as equidistant, is the only judgment that could be pronounced. It is contrary to common sense to say there is any difference in propinquity of kindred between the child and parents of any person. Between persons in equal * propinquity * 242
or proximity, dignity of blood may give a preference; *Counden v. Clarke*; (a) but there is no room for that distinction here. There is an argument by Vinnius, referred to by

(a) 2 Hob. 29.

Lord HARDWICKE in *Evelyn v. Evelyn*, that some persons may have a right of succeeding to property in exclusion of others in equal or nearer degree of proximity, if they have a *jus potius*. Admitting such rule in the succession to personal as well as real property, we cannot allow its application to the construction of a term which has no reference to succession of any kind; which must be read next in propinquity, and not next in succession; and must therefore be construed by the *jus propinquitatis*, as was applied in *Brandon v. Brandon* and *Elmsley v. Young*.

Mr. Tinney, in reply. — With regard to the point that has been raised, now for the first time in this case, that the appellant, being a volunteer, is not entitled to the aid of a Court of Equity to enforce her claim under the ultimate limitation in the settlement, and that no action at law could be brought on the covenant of James Mangles to pay the 10,000*l.* to the trustees, because F. Mangles, as surviving trustee, being also an executor of J. Mangles, could not have an action against himself; it is to be observed that the appellant sues as administratrix of the child, and that the defendants F. Mangles and the other executors of J. Mangles admit assets of their testator, subject to his voluntary debts, and such debts are recoverable at law or in equity. It is true, an executor or administrator cannot bring an action against himself for a debt due to him in his private or other character, but the law gives him a remedy to retain the debt out of the assets

* 243 in his hands, * *Plumer v. Marchant*, (a) and if they are not sufficient he may bring an action against the heir, where the heir is bound by the covenant; (b) therefore it is no impediment to the creditor's recovering his debt that he is executor of the debtor; his power to recover is even better by his being in that position. Besides, F. Mangles is not the only surviving trustee of the settlement, or the only executor of J. Mangles: the defendant Monro is another of the trustees, and he may, on this covenant, sue the executors, and if they have not assets, then the heir of J. Mangles. Both

(a) 3 Burr. 1380.

(b) Co. Litt. 264 b., n, 209.

trustees, however, declined to take any proceedings, and the appellant had no alternative but to file her bill, and make them parties defendants. This was such a covenant as equity would decree a specific performance of, without putting the party to an action of covenant in the trustee's name.

Vernon v. Vernon. (a) In that case, Lord Chancellor KING, at the end of his judgment, said, as a further reason for execution of the covenant, "no creditor can be here hurt by a specific performance of this agreement; wherefore, as the defendant has admitted assets, let her purchase and make a settlement of lands pursuant to the articles." That a Court of Equity will compel execution of such covenants, there is the further authority of *Stephens v. Trueman* (b) and *Lomas v.*

Wright. (c) But there is no pretence for saying that this was a voluntary debt; because with this covenant by the lady's father to settle 10,000*l.*, and with the expectancies she had from her maternal relations to be settled in like manner, she and they purchased of her husband, to whom all her property * would go if there was no settlement, * 244 the right to appoint it to her brothers and sisters, or let it go to her own next of kin: so that this is a distinct case of purchase.

On the point that the child was not excluded from the benefit of the ultimate limitations, the recent cases of *Elmsley v. Young* and *Pearce v. Vincent* have been referred to, as sufficient to establish that point. It may be further observed, that Mrs. Withy had power of appointing not only to her children, but also to her brothers and sisters and their children; but she had no power to appoint to her father and mother, who, it is now contended, are entitled to take under the ultimate limitation, in default of appointment. Suppose Mrs. Withy had two or more children, and she, surviving her husband, died without appointing to this property, leaving those children under twenty-one, and that they married and died under that age leaving children, those children would be penniless, the father and mother taking all the property!

(a) 2 P. Wms. 595.

(b) 1 Ves. Sen. 73.

(c) 2 My. & K. 769.

Could that be the intention of the settlement? Nothing can be more absurd than the imputation of intention in this settlement, that the father and mother were to take it all as next of kin. The case of *Bird v. Wood*, (a) cited for this argument, has been frequently overturned, and even by the same Judge who decided it.

The important question is, whether the child of Mrs. Withy was her sole next of kin at her death, or her father and mother were equally next of kin to her with the child. Next of kin is a technical term, having no precise definition, but descriptive of relation to a person. The accepted undisputed

next of kin are, first, a person's descendants; in default * 245 of them, * the ascendants and their collaterals. In all the text-books, the terms are taken to be exclusive of parents where there are children, and these are preferred in successions to personalty and in administrations. But it is alleged that there is a law of propinquity, or a law of nature, which holds the father of a person as near to him as his child. This fourth law of reckoning degrees of kindred is not noticed by the text-writers in their tabular views of the degrees; if it exists, where is it to be found?

[LORD COTTENHAM. — If it can be shown that the Ecclesiastical Courts grant administration to the child, because he is nearer of kin than the parent, that would maintain your argument.]

There is no case in which they have exercised an option or discretion between the parent and child of an intestate. The passage before quoted from Blackstone (b) excludes all notion of equality.

[LORD COTTENHAM. — I infer from that passage that the parent and child are in equal degree.]

Next of kin, used simply, is a technical term, meaning children, never parents; it implies succession to personal

(a) 2 Sim. & Stu. 400.

(b) 2 Comm. 504.

estate, as the term "heir" designates succession to real estate. The Statute of Distributions first let in persons who were not next of kin to share with the next of kin by right of representation. How this was may be seen in the case of *Carter v. Crawley*, (a) which may be said to be a contemporaneous exposition of the statute. The forms of the grants of administration before the statute, found in the records in the prerogative office, show that the children were held properly entitled. In one form of grant of administration to the parent of the intestate, he is described as *cælebs*, without wife or children; implying * that if he had * 246 children, they, and not his father, would have the administration.

[LORD COTTENHAM. — It appears there was no change made in the forms of the grants by either statute (of Henry 8 or Charles 2); and that administration was granted to the child as child of the intestate, and not as next of kin.]

It appeared from the contested cases, that where there were no children, preference was given to those of the claimants that were nearer in degree. *Blackborough v. Davis*, (b) *Evelyn v. Evelyn*. (c) Is it not reasonable, therefore, to infer that the children, where they existed, were preferred because they were deemed nearer to the parent, or had the *jus potius*?

Mr. Humphrey, in the absence of his leader, was heard to observe on the new cases cited in the reply.

June 30.

LORD COTTENHAM. — My Lords, being of opinion that the Master of the Rolls' judgment is right in the construction he put upon the terms "next of kin," it is unnecessary for me to consider any of the other points raised in the argument. The event having happened, in which it was by the settlement declared that the 10,000*l.* should be held upon trust for such person or persons as at the death of Emily Mangles

(a) Sir T. Raym. 496.

(b) *Ubi supra*, p. 225.

(c) *Ubi supra*, p. 226.

should be her next of kin, the question is, who at that time answered that description, she having left a son and her father and her mother her surviving.

● The first consideration is, What is the rule of the law of England in extending the proximity of kindred? for * 247 such rule must govern, unless superseded * by what constitutes the second consideration; which is, Have the words used received a conventional or technical construction? for if they have, such must be considered as the sense in which they have been used.

As to the first of these questions, there really is no doubt; all writers agree that in extending proximity of kindred, the law of England considers the ascending and descending lines as equal. Blackstone, in the passage quoted for another purpose by the appellant, says, "both" — that is, the children and the parent — "are in the first degree." (a) If, then, the law of England considers the child and the parent of a person deceased as equal in degree of proximity, nothing can prevent their taking equally under a limitation to "next of kin," but such words having received some construction and technical meaning different from and controlling this their obvious and natural meaning. The point to be established by the appellant is, that "next of kin" has been construed to describe one nearest in proximity in the descending line, to the exclusion of all in the ascending line, though equal or nearer in degree of proximity. In support of this proposition it was first urged, that in the succession to property the descending line is preferred to the ascending; but unless this preference be founded upon the supposition that the party preferred is nearer of kin, it proves nothing. The passage in Blackstone before referred to, and relied upon by the appellant, shows that in his opinion proximity of kindred was not the ground of the preference. He says, "both, indeed, are in the first degree, but with us the children are allowed the preference;" that is, they are preferred * 248 * in grants of administration, though not nearer of kin than the parents of the deceased; from which it fol-

(a) 2 Black. Comm. p. 504.

lows that the right of the child, in preference, to grants of administration has no bearing upon the construction to be put on the words "next of kin."

The Statute 21 Hen. 8, c. 5, proves the same thing; for it gives to the Ordinary the power of selecting, amongst persons in equal degree of kindred, to whom administration should be granted. How, then, can the granting of administration, in pursuance of this power, to the child in preference of the parent of the deceased, prove that the child is considered as being nearer in degree of kindred? It is an established rule of the Ecclesiastical Court that the right to the administration of the effects of an intestate follows the right of the property in them. *In re Gill*, (a) to the exclusion even of next of kin, notwithstanding the express provisions of the Statute of Henry 8; as in *Bridges v. The Duke of Newcastle*, before the delegates in 1712, and cited in *West v. Wilby*, (b) *Young v. Peirce*. (c) How, then, can the right of the child, who is entitled to the property of the deceased, to have administration granted to him in preference to the parent of the deceased, who is not so entitled, prove that the child is considered as nearest of kin?

It was then argued that the term "next of kin" had, by usage, acquired a meaning in which it must be supposed to have been used in the settlement; and that such meaning was, "those who, as next of kin, were entitled to the succession to personalty." The Statute of Distributions (d) accurately preserves the distinction between "next of kin," and those to whom * it directs the distribution of the * 249 personalty. If there be no children, it directs the distribution of the estate equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them; and then confines the representation within brothers' or sisters' children; not treating the rights of those who take by representation as belonging to them as next of kin, but as derived from others, who, if they had lived, would have been next of kin. If the familiar expres-

(a) 1 Hagg. 342.

(c) 1 Freem. 496.

(b) 3 Phillimore, 381.

(d) 22 & 23 Chas. 2, c. 10.

sion, "next of kin under the statute," be considered as having reference to this provision of the statute, it will not be found to be so inaccurate as has been supposed. The question, however, is not whether "next of kin under the statute" has not been inaccurately used as describing those who are entitled under the statute, but whether the term "next of kin," without any reference to the statute, has received any such judicial construction. A short examination of the cases will show that the contrary is established by a very great preponderance of authority. The first referred to in support of the affirmative of this proposition is a *dictum* of Lord KENYON in *Stamp v. Cooke*, (a) in which he is represented as saying, "if the residue had been given to the next of kin, and the testator had stopped there, the statute would certainly have been the rule to go by." This was merely a *dictum*, for the question did not arise in the case, the gift being to the testator's "next relations, as sisters, nephews, and nieces;" which Lord KENYON construed to mean, that the property should be parted amongst them in the same way as the statute directs. In *Phillips v. Garth*, (b) Mr. Justice BULLER held, that a gift to "next of kin, share and share alike," was a gift to those whom the statute pointed out, but (which * from the words was unavoidable) that they were all to take equally; a direction sufficient of itself to prove that the testator did not mean that his property should go according to the provisions of the Act. In *Hinckley v. Maclarens*, (c) Sir JOHN LEACH decided that a gift to next of kin operated in favour of a brother and the children of deceased sisters to take *per stirpes*, or under the statute. This was certainly more correct in principle than what was done by Mr. Justice BULLER in *Phillips v. Garth*; but it was giving a meaning to words very foreign to their natural and obvious meaning, and without any ground for assuming that the testator had used them in that sense, or that they had by usage or decision obtained any such construction. If "next of kin" mean those who would take under the statute, it must include in many cases

(a) 1 Cox, 236.

(b) 3 Bro. C. C. 64.

(c) 1 My. & K. 27.

those who are not next of kin ; and a gift to a class, which in all other cases gives an equal portion to each member of the class, must in this particular case be governed by a different and altogether artificial rule of construction. This decision, in *Hinckley v. Maclarens*, was followed by the same learned Judge, in *Elmsley v. Young*. (a)

Such are the authorities in support of the proposition ; of which, that of Lord KENYON, being merely a *dictum*, was not capable of being reviewed ; that of Mr. Justice BULLER was disapproved of by Lord THURLOW, Lord ELDON, Sir WILLIAM GRANT, Sir THOMAS PLUMER, and every other Judge except Sir JOHN LEACH ; and that of Sir JOHN LEACH was expressly overruled upon appeal, in the case of *Elmsley v. Young*. (b) Lord THURLOW, it is true, did not overrule Mr. Justice BULLER's judgment in *Phillips v. Garth*, (c) because the brothers had not appealed ; but he so *strongly felt * 251 the unsoundness of that decision, that when the case came before him upon another point he ordered that the case should stand over, that the brothers might present a petition of rehearing. In *Garrick v. Lord Camden*, (d) Lord ELDON expressed his concurrence in Lord THURLOW's opinion. Sir W. GRANT, in *Smith v. Campbell*, (e) expressed a similar opinion ; and in the previous case of *Wimbles v. Pitcher* (g) he held brothers entitled, to the exclusion of nephews, under the words "next of kin in equal degree, share and share alike." Sir T. PLUMER, in *Worthington v. Stother* (h) and in *Brandon v. Brandon*, (i) decided—upon the words "next of kin in equal degree," in the former, and "nearest and next of kin in equal shares," in the latter—in favour of brothers and sisters, to the exclusion of nephews and nieces. In *Elmsley v. Young*, (k) upon an appeal from the Rolls, the present Vice-Chancellor, Sir LAUNCELOT SHADWELL, and Mr. Justice BOSANQUET, sitting as Lords Commissioners, upon the above authorities, overruled the decision of Sir JOHN LEACH.

(a) 2 My. & K. 82.

(c) 3 Bro. C. C. 69.

(e) 19 Ves. 404.

(h) 1 Madd. 36.

(k) 2 My. & K. 780.

(b) 2 My. & K. 780.

(d) 14 Ves. 385.

(g) 12 Ves. 438.

(i) 8 Swanst. 319.

With the exception, therefore, of the opinion of Sir JOHN LEACH, which was so overruled, there has been a uniform course of decisions and of opinions expressed for upwards of fifty years, in opposition to the doctrine of Mr. Justice BULLER, in *Phillips v. Garth*; but these decisions and opinions are not only decisive as to the weight of authority, but they displace the only ground upon which the contrary doctrine could be supported.

The appellant can only succeed by showing that the term "next of kin" had, by a technical and conventional * 252 construction, obtained the meaning of "those * who would be entitled, in case of intestacy, under the Statute of Distributions." That is a question of fact; and had it been so used, all the Judges whose opinions have been referred to as objecting to the doctrine of Mr. Justice BULLER in *Phillips v. Garth*, since the year 1790, have been ignorant of the fact, and have held that the words had not obtained any such construction. I find no trace of any such construction having been adopted except by Lord KENYON in *Stamp v. Cooke*, in 1786, and by Mr. Justice BULLER in *Phillips v. Garth*, in 1790, which was in the same year repudiated by Lord THURLOW. To give such a construction to the words would be, under the term "next of kin," to include persons not of kin at all, as husbands and wives;¹ and under the word "next," to include persons comparatively remote with those nearest of kin.

It is some satisfaction to be able to trace the origin of Mr. Justice BULLER's opinion, because it tends to diminish the weight which would otherwise attach to any decision of his: he says, (a) "I cannot distinguish this case (*Phillips v.*

(a) 3 Bro. C. C. 69.

¹ As between husband and wife, neither of them can be said, in the ordinary sense, to be next of kin to the other. 2 Jarman Wills (4th Am. ed.), 36, note (1); 2 Kent (11th ed.), 136, 142; *Watt v. Watt*, 3 Ves. (Am. ed.) 244, note (a) and cases cited; *Whittaker v. Whittaker*, 6 John. 112; *Hoskins v. Miller*, 2 Dev. 360; *Dennington v. Mitchell*, 1 Green, Ch. 243; *Byrne v. Stewart*, 3 Desaus. 135; *Storer v. Wheatley*, 1 Penn. St. 506; *Milne v. Gilbert*, 3 De G., M. & G. 715; s. c. 5 De G., M. & G. 510. The husband is not "next of kin" to the wife. ALLEN, J., in *Green v. Hudson, &c. R.R. Co.*, 32 Barb. (N. Y.) 25.

Garth) from that of *Thomas v. Hole*; (a) that case is in point, except that there the word is 'relations,' which being to be construed next of kin, makes it this case." The principle of that case, and of the many others which have followed it, had no application to that of *Phillips v. Garth*. The term "relations" *per se* is too general; all mankind are in a sense related, and it is impossible in any case to say where relationship terminates. If, therefore, the Court had not put some restrictions upon the generality of the term, all such gifts must have failed; and that, Lord KING, in *Thomas v. Hole*, states to be the reason of his decision. To prevent this failure of * the testator's intention, the Courts * 253 construed the term "relations" to mean such relations as would take under the Statute of Distributions. In doing this, though a qualification was added to the expression, no violence was done to it, for all who could take under the statute would be relations, except husbands and wives, and they were excluded; whereas, in the term "next of kin" there is no uncertainty, and no objection from its being too general; and the rule of the statute cannot be adopted without doing violence to the description, proximity not being exclusively the qualification under the statute. Not only is the distinction between "relations" or "near relations," and "next of kin" obvious, but in *Marsh v. Marsh*, (b) which was before *Phillips v. Garth*, under a gift to nearest relations, a sister was held entitled, to the exclusion of nephews and nieces; and this was followed by Sir W. GRANT, in *Smith v. Campbell*. (c)

A testator may, indeed, so express himself, as to intimate an intention that the rule of the statute should prevail; as in *Stamp v. Cooke*. So in *Lowndes v. Stone*, (d) a gift of the residue of estate and effects to next of kin or heir-at-law was held to include nephews with an uncle, the words implying heirship according to the nature of the property; and in *Garrick v. Lord Camden*, (e) Lord ELDON intimated an opinion that the same construction would be put upon a gift

(a) Cas. temp. Talbot, p. 251.

(b) 1 Bro. C. C. 293.

(c) Coop. 272; 19 Ves. 404.

(d) 4 Ves. 648.

(e) 14 Ves. 885.

of residue "to be divided among my next of kin, as if I had died intestate," which could only be effected by adopting the rule of the statute.

I think that the appellant has wholly failed in proving that the term next of kin, used *simpliciter*, has, by a technical or conventional construction, obtained the meaning of "those who would be entitled, in case of intestacy, under the Statute of Distributions:" and I am, therefore, of opinion that these words must be construed in their natural and obvious meaning, of nearest in proximity of blood; and being of that opinion, I think that this appeal ought to be dismissed, with costs.

LORD CAMPBELL. — I own that I have entertained very considerable doubts in this case; and now, although I shall concur in the judgment which has been pronounced by my noble and learned friend, I do so with considerable reluctance. It seems to me that we are driven to put a construction upon the terms of this settlement, which could not by possibility have entered into the contemplation of the parties, or the gentleman who framed it. I do not think that there was any notion that, there being a child, the father or mother should share in the money that was settled: and according to this doctrine, which I think upon the whole we are now bound to follow, still more preposterous consequences might follow; because there might have been grandchildren, who would have had no share, who would have been entirely destitute, and the grandfather and grandmother would have taken the whole.

I own that I should have been very glad to have found that the term "next of kin" had received a legal signification, and that it might be considered as tantamount to "heir" in immovables. There is some ground for that contention, I think; because it is allowed, that upon a reference to the Master to inquire into the next of kin, he looks to see who would share according to the Statute of Distributions; and the construction put upon the Statute of * Henry 8, I own has had some influence upon my mind; because by that it is enacted, that the administration is to be granted

to the wife of the testator, or to the next of kin, or to both. Now, under the expression "next of kin," it has been always held that the child is entitled *de jure* to administration in preference to the father and mother. The Court of Queen's Bench would issue a *mandamus* to the Ecclesiastical Court to grant administration to the son; that is explained by saying that administration follows the property. I own that that weakens the argument, but still it has considerable force in my mind.

When I look to the authorities, I think that, till we come to *Elmsley v. Young*, they were rather more equally balanced than strikes the more experienced mind of my noble and learned friend; because till then you had Mr. Justice BULLER, Lord KENYON, and Sir JOHN LEACH, all Judges of very great experience, and entitled to very great respect, clearly intimating the opinion that "next of kin" was to be construed with reference to the Statute of Distributions. Then the doubt thrown upon *Phillips v. Garth* might, to a certain degree, be explained by a mistake, into which Mr. Justice BULLER fell, in saying that the parties in that case were to take *per capita*, instead of *per stirpes*. However, on the other side there are those very high authorities, Lord ELDON, and the other learned Judges, Lord THURLOW, Sir W. GRANT, and Sir T. PLUMER, who must be taken to have questioned *Phillips v. Garth*, not only upon the ground of that mistake, but likewise upon the general principle upon which it is founded; because I think the words "nearest" and "next of kin" are essentially the same. If I had had to decide *Elmsley v. Young*, I certainly should have hesitated a good deal before * I came to the decision that was pronounced * 256 by those very learned Judges, the then Lords Commissioners of the Great Seal. But, however, it seems to me that the law must be taken as settled by that decision. That case was very deliberately considered; the judgment was pronounced by very learned Judges, and it has the very high sanction of my noble and learned friend, who was then one of the Lords Commissioners. Under these circumstances, we cannot reverse this decision of the Master of the Rolls without upsetting *Elmsley v. Young*, which it is quite clear that

we cannot do. I think that the decision in *Elmsley v. Young* must be considered as having finally settled this controverted question, and to that decision I feel that I am bound to adhere; but I do it with great reluctance. It is impossible to deny that the law has, by some bad luck, got into a strange state,¹ and that now, unless great caution is observed in framing deeds, very calamitous consequences will take place; and that upon deeds already drawn, where merely the words "next of kin" occur, without any other words to specially point out the meaning, the intention of parties may be disappointed. But, upon the whole, it seems to me that greater mischief would ensue from shaking or overturning that case of *Elmsley v. Young* than by adhering to it. Therefore I concur in the judgment which has been proposed by my noble and learned friend, in adhering to *Elmsley v. Young*, by which we affirm the decree of the Master of the Rolls in this case.

[It was then ordered that the appeal be dismissed, and the decree affirmed; and that the appellant do pay to the respondents the costs incurred by them in the appeal.]

¹ See *Houghton v. Kendall*, 7 Allen, 77.

* DRAKE v. THE ATTORNEY-GENERAL. * 257

1843.

WILLIAM WALKER DRAKE *Appellant.*
 THE ATTORNEY-GENERAL *Respondent.*

*Probate Duty. Legacy Duty.**Et e Contra.*

J. R. by will directed his real estates to be sold and converted into personalty ; and after giving certain legacies, he thereby vested the residue in trustees, for the use of his daughter J. A. P. for life, with power to her to appoint the same by will, but expressly excluding from the benefit of that appointment certain persons named or indicated in his will ; and directed that, in default of appointment, or so far as such appointment should be incomplete, the residue should be held by the trustees in trust for the next of kin of D. R. This power was exercised by J. A. P. by her will, partly in favour of the next of kin of D. R., and partly in favour of other persons.

Held (affirming the decree of the Master of the Rolls) —

First, that she must be considered to have had, notwithstanding the special exclusions in her father's will, an absolute power of appointment within the meaning of the 36 Geo. 3, c. 52; and that consequently legacy duty was payable by her appointees, upon the bequests made by her, as being, under the 7th section, bequests made by her out of personal estate which she had the power of disposing of.

Secondly, that this property, though subject to her power of disposal, was not so strictly her own property, as to render it, under the 18th section, liable to probate duty under her will, as property which she had died possessed of or entitled to.¹

Practice.

In a case where a private party had presented an appeal, and the Attorney-General, on behalf of the Crown, had presented a cross-appeal against the same decree, the counsel for the private party were heard continuously on both appeal and cross-appeal, and then the counsel for

¹ See *Attorney-General v. Upton*, L. R. 1 Exch. 224; *Attorney-General v. Littledale*, L. R. 5 Exch. 275 ; 1 *Jarman Wills* (3d Eng. ed.), 2, note (f) ; *Re Wallop's Trust*, 1 De G., J. & S. 656 ; *In re Lovelace's Will*, 4 De G. & J. 340.

the Crown were heard on both, and the senior counsel for the private party was heard in a final reply ; and this course was adopted, although the case was one in which, being a matter of revenue, the Crown was directly concerned.²

July 7, 10, 1843.

THERE were two appeals in this case against an order of the Master of the Rolls. Both depended on the construction to be given to the 36 Geo. 3, c. 52, §§ 7 & 18, as applied to the third part of the schedule of the 55 Geo. 3, c. 184. The questions involved in the appeals related to the right

* 258 of the * Crown to be paid legacy duty and probate duty on property disposed of in the following manner:

one person had made a will creating a power of appointment which was to be exercised by will, and the donee of the power had executed it by will. The legacy duty was claimed as upon property given by the will of a person dying after 1805: the probate duty was claimed on the will of the donee of the power, in respect of the property appointed by her under the power. The 36 Geo. 3 relates only to legacy duty, but the liability to probate duty depended on the construction to be put on that statute, on the terms of which it was to be decided whether the property thus appointed by the second will was to be considered as the "estate and effects" of the person making the appointment, or must be treated as the "estate and effects" of the person by whose will this power of appointment had been created. The words of the third part of the schedule of the 55 Geo. 3, c. 184, so far as they relate to probate duty, are, "the estate and effects which the deceased shall have been possessed of or entitled to." So far as they relate to legacy duty, they are, "given by any will of any person out of his or her personal or movable estate, or out of any moneys to arise by sale, mortgage, or other disposition of his or her heritable estate." (a)

(a) By the 36 Geo. 3, c. 52, § 7, it is enacted, "That any gift by any will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such will or testamentary instrument, have effect or be satisfied out of the personal estate of such person so

² See *O'Connell v. The Queen*, 11 Cl. & Fin. 155, 231.

John Ramsden made his will, properly executed and attested, bearing date the 10th of March, 1825, whereby, after directing his real estates to be sold and converted into personalty, and giving certain legacies, he gave all the residue of his estate and * effects to his daughter, Judith * 259 Ann Platt, widow, formerly Judith Ann Ramsden,

dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this Act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same ; except so far as the same shall be paid or satisfied out of such real estate in a due execution of the will or testamentary instrument by which the same shall be given," &c.

And by the 18th section, it is further enacted, " That where any legacy, or the residue, or any part of the residue of any personal estate, shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty as property given to different persons in succession ; and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall, in respect of their several interests, whether previous, or subject to, or under, or in default of such appointment, be charged with the same duty, and in the same manner as if the same interests had been given to him, her, or them respectively, in and by the will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be ; and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty and in the same manner as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof ; and where any property shall be given with any such general power of appointment, which property, in default of appointment, will belong to the person or persons to whom such power shall also be given, such property shall be charged with, and shall pay the duty by the said Act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment."

~~was~~ Routh, John Sharman, and John Gillett (whom he afterwards appointed to be executrix and executors of his ~~said~~ will), upon trust to permit his said daughter to receive the interest thereof during her life, and after her decease upon trust that his trustees or trustee should

* 260 * pay thereout 3000*l.* to the said John Sharman, and 3000*l.* to the said John Gillett; and the will of the said testator then proceeded thus: "And I hereby direct that, after such last mentioned payments, my then surviving trustees shall stand and be possessed of the said trust moneys, stocks, funds, and securities, and the dividends, interest, and income thereof, and of the rents and profits of my said freehold and copyhold hereditaments and premises, until the sale of the same, upon trust for such person or persons (other than and except Joseph Woodhead, of Russia Row, Cheapside, and his relations; Moses Hoper, of Dorset Street, Esq., and his relations; and the relations of the late husband of my said daughter, and every of them), in such parts, shares, and proportions, for such intents and purposes, and in such manner and form, as the said Judith Ann Platt, as well when covert as sole, and notwithstanding her coverture, by her last will and testament in writing, or any writing purporting to be or being in the nature of her last will and testament, or any codicil or codicils thereto, to be by her signed and published in the presence of and attested by two or more credible witnesses, shall direct or appoint; and in default of such direction or appointment, and so far as such direction or appointment, if incomplete, shall not extend, upon trust for the next of kin of Dyson Ramsden, late of Waterclough, in the parish of South Oram, near Halifax, in equal shares and proportions, and to pay the same to them accordingly." And the testator declared that, if his daughter should intermarry with Joseph Woodhead, or any of his relations, or should reside with or receive visits from him or them, the bequest in her favour, with the power of appointment given to her, should be thenceforth absolutely null and void.

* 261 * The testator died on the 10th of May, 1826, without having altered or revoked his will, leaving Judith Ann Platt his only child and heiress-at-law and sole next of kin.

On the 21st of August, 1826, the will was duly proved in the prerogative court of the Archbishop of Canterbury, by Judith Ann Platt and all her coexecutors.

Soon after the death of the testator, Judith Ann Platt filed a bill in the Court of Chancery against her coexecutors and trustees named in the will, for the purpose of having the estate of John Ramsden administered, and the trusts of the will carried into execution under the decree of the Court.

By a decree made on the hearing of the cause by the Master of the Rolls, dated the 10th of March, 1828, it was ordered that the will of the testator should be established, and the trusts thereof performed and carried into execution. The estate was duly administered, and the residue, amounting to upwards of 125,000*l.*, was duly secured and invested according to the trusts of the will, and the dividends and income thereof paid to Judith Ann Platt during her life.

After the death of the said John Ramsden, Judith Ann Platt intermarried with George Edmund Platt, Esq. (who survived her); and on the 27th day of April, 1837, she made her will in execution of the power given to her under her father's will, and thereby appointed that, immediately after her decease, all the residuary personal estate of the said John Ramsden, over which she had any disposing or appointing power by virtue of his will, should be in trust and be conveyed and assigned and paid and payable to William Walker Drake, his heirs, executors, administrators, and assigns, upon the trusts therein mentioned; * and declared * 262 that thereout should be raised and paid the various sums of money therein particularly mentioned, to the several persons therein also mentioned; and, amongst others, she directed that the sum of 10,000*l.* 3 per cent consolidated bank annuities should be paid to persons who would, if she had died without exercising the power of appointment, have been entitled to the residuary estate of John Ramsden under the description of the "next of kin of Dyson Ramsden aforesaid," or the personal representatives of such of them as might be dead; and subject thereto, she did by her said will appoint, &c., all and singular the real and residuary personal

estate and effects of her late father, and over which she had any disposing or appointing power by virtue of his will, to William Walker Drake, his heirs, &c.; and she appointed him and George Edmund Platt executors of her said last will.

On the 9th of September, 1837, Judith Ann Platt died without having altered or revoked her will, and on the 15th of November following, letters of administration, with the will annexed, were granted to William Walker Drake alone, by the prerogative court of Canterbury, George Edmund Platt having declined to act therein; and William Walker Drake thereby became the sole legal personal representative of Judith Ann Platt.

William Walter Drake, on the 30th of June, 1838, presented his petition in the cause of *Platt v. Routh*, praying the transfer to him of the funds in Court constituting such residuary estate and effects of John Ramsden; and thereupon the Attorney-General, on behalf of her Majesty, claimed payment of legacy duty in respect of the gift to Judith Ann Platt and of the legacies given by her, and probate duty upon the property which passed under and by virtue of her will.

The petition came on to be heard before the Master
 * 263 * of the Rolls on the 5th July, 1838, when a case was ordered for the opinion of the Court of Exchequer, so as to bring in issue all claims which were or should be raised on behalf of the Crown to probate duty and legacy duty, under the wills of John Ramsden and Judith Ann Platt respectively.

A case was accordingly submitted to that Court, setting forth the matters hereinbefore stated, and containing the following five questions:—

1st. On what principle is legacy duty payable in respect of the bequest in the will of John Ramsden, of the residue of his estate and effects to Judith Ann Platt, to be calculated?

2d. Whether probate duty is payable upon the probate of the will of Judith Ann Platt, in respect of the estate and

effects bequeathed and appointed by her will as aforesaid? and if the Court shall be of opinion that probate duty is payable only in respect of some portion of the said estate and effects, then,

3d. In respect of what portion of such estate and effects is probate duty payable?

4th. Whether legacy duty is payable in respect of the several bequests contained in the will of Judith Ann Platt? and if the Court should be of opinion that legacy duty is payable in respect of the bequests in the will of Judith Ann Platt, then,

5th. At what rate is the legacy duty payable in respect of the said several bequests respectively to be calculated?

The case was heard before the Court of Exchequer on the 8th May, 1840, and the Judges of that Court certified: (a) 1st. That on the death of Judith Ann Platt, a duty of one per cent became payable in respect of the bequest in the will of John Ramsden, of * the residue of his estate * 264 and effects to her, after allowing any duty already paid in respect thereof; 2d and 3d. That no probate duty is payable upon the probate of the will of Judith Ann Platt in respect of the estate and effects of her late father, appointed by her in pursuance of the power given to her by his will; 4th and 5th. That legacy duty is payable in respect of the bequests contained in the will of Judith Ann Platt, at the same rate at which such duty would have been payable if the bequests had been mere legacies given by her, payable out of her personal estate.

Two petitions were afterwards presented in the said cause, one by the Attorney-General, and the other by William Walker Drake; and, by an order made by the Master of the Rolls on hearing the said petitions, dated 16th January, 1841, (b) it was declared that the legacy duty of one per cent became payable under the will of John Ramsden in respect of the bequest, in his will contained, of the residue of his estate and effects to the late Judith Ann Platt: that no pro-

(a) *Platt v. Routh*, 6 M. & W. 756; 10 Law Jour. (Exch.) 105.

(b) *Platt v. Routh*, 8 Beav. 237; 11 Law Jour. (Equity) 131.

bate duty was payable upon the probate of the will of Judith Ann Platt in respect of the estate and effects of John Ramsden, appointed by her in pursuance of the power given to her by his will; and that legacy duty was payable in respect of the bequests contained in the will of Judith Ann Platt, at the same rate at which such duty would have been payable if the bequests had been mere legacies given by her, payable out of her own personal estate. An inquiry before the Master was directed accordingly.

William Walker Drake appealed against this decree, so far as it declared that legacy duty of one per cent became payable under the will of John Ramsden in respect of the be-
 * 265 quest in his will contained of the * residue of his estate and effects to Judith Ann Platt, and that legacy duty was payable in respect of the bequests contained in her will, at the same rate at which duty would have been payable if the bequests had been mere legacies given by her, payable out of her own personal estate: and the Attorney-General appealed against the decree, so far as the same declared that no probate duty was payable upon the probate of the will of Judith Ann Platt in respect of the estate and effects of John Ramsden, appointed by her in pursuance of the power given to her by his will.

Mr. Tinney (Mr. Pemberton Leigh and Mr. Teed were with him), for the appellant Drake. — The two cases are intimately connected, and both alike depend on the question, whether Judith Ann Platt was to be considered as the owner of this property under her father's will, or as only enjoying an estate for life in it, with a power of appointment, which she might exercise within certain restrictions. The Attorney-General here seeks what the law will not allow, the payment of two legacy duties on the same property and taken under the same right, one from her and the other from her appointees; and he further demands the probate duty as if this estate had been the real property of Judith Ann Platt. The Court of Exchequer negatived this last demand, but allowed the two others; and the Master of the Rolls adopted in substance that opinion.

This case depends on the construction of two sections in the Act 36 Geo. 3, c. 52. Those sections are the 7th and the 18th. The former applies to the question of the legacies now charged as being given under the will of John Ramsden; the latter applies to * the power of appointment * 266 created by that will. With regard to this power of appointment, it is submitted that it does not fall within the provisions of this statute. In the first place, it is not a power of appointment where the parties are specially named; in the next place, it is not one which can properly be called general and absolute. On the contrary, it is a power where the persons specially named are those who are directly excepted from taking any benefit under it, and one where the power given is one of a restricted nature. It does not, therefore, in either case fall within the words of the statute. It is clearly nothing more than a qualified power of appointment. In the first place, Mrs. Platt could not appoint during her life; the appointment must be by will; and then there are certain persons who are expressly excluded from the benefit of her appointment. Whatever were her own wishes, she could not confer any benefit on them. It was contended before the Master of the Rolls that this was not a case within any one of the three branches of the 18th section of the Act, and that consequently no duty as imposed by that section was payable upon it. It is again submitted that that argument is well founded, and that the case here is not one for which the statute has provided.

Then comes the second question,—whether the legacy duty was payable by the person in whose favour the gift of the estate of John Ramsden was made by Judith Ann Platt. That depends on the 7th section of the Act. But that section must be construed with the 18th, and can only be held to apply in the case of a gift made by a person who has power to dispose of the estate “as he or she shall think fit.” It was, therefore, contended in the Court below, that the appellant here, not taking any benefit under an absolute, but only under a restricted power of appointment, * did * 267 not fall within the 7th section, and was not liable to pay legacy duty either under the will of John Ramsden, or

under the appointment of Mrs. Platt. Then, as to the probate duty, both the Court of Exchequer and the Master of the Rolls were satisfied that no probate duty was payable. In the judgment of the Court of Exchequer it was said: (a) "The points on which the opinion of this Court is desired are These: as to the legacy duty payable in respect of the bequest contained in the two wills, and as to the liability of Judith Ann Platt's will to the probate duty. The question, so far as regards the legacy duty, appears to us to depend entirely on the construction to be put on the 18th section of the 36 Geo. 3, c. 52, which regulates the duty in cases where legacies are given subject to a power of appointment. It will be observed that the legislature in this section refers to two sorts of powers of appointment only: first, powers of appointment to or for the benefit of any person or persons specially named or described as objects of the power; and, secondly, general and absolute powers of appointment. It is plain, from the whole context of the Act, that these two classes of powers were meant to include all possible cases; and the question, therefore, is, under which class does the power now under consideration range itself? It does not literally come within either description. It is not a power to appoint for the benefit of persons specially named or described, for no persons are either named or described. It is not a general and absolute power, because there are certain persons, and their families, in whose favour the power cannot be executed. In applying

the provisions of the Act to a case like the present,
 * 268 some violence, therefore, must be done to the * language of the clause in question; and after much consideration, we think that there is less difficulty in treating this as a general and absolute power than as a power to appoint for the benefit of persons specially named or described."

So far the judgment is conclusive in favour of the appellant. The Act contains no provision for the payment of legacy duty in any other case but these two; and the present case falls within neither branch.

(a) 6 M. & W. 788.

THE LORD CHANCELLOR. — But you should refer to one sentence of the judgment you have quoted, where it is declared that the Act was obviously intended to include all possible cases.]

That is so, but that refers the matter to intention and inference ; and it is a settled principle of law that a duty cannot be levied on the subject by way of inference only. No legacy duty is payable under the 7th section, except out of the personal estate of the person dying. Here the personal estate is that of John Ramsden, but here was no legacy by John Ramsden to any person whatever, at the time when he came within the description of the Act, and was “the person dying.” The Judges in the Exchequer said, that the power must be considered as coming within one of two classes. But that is a mistake. The section provides for the payment of legacy duty out of the personal estate of the person dying. This is the personal estate of John Ramsden. But the money was not given by him, nor was it money given to certain persons ; nor was it given by a person who could dispose of it as she might think fit. This is the case of a limited interest, with a power of appointment. But even that power is not general nor absolute.

[THE LORD CHANCELLOR. — If there is a general and absolute power, you admit that the duty is properly imposed ?

LORD COTTENHAM — The words of the 18th section are, “specially named or described.”]

* Those words cannot apply here, for the legacy * 269 duty must take effect upon a legacy made under the will of a person out of whose estate it is to be paid. That is not so here. Judith Ann Platt is not a person specially named or described ; she is not a legatee. Then she can only be liable to pay, as a person having a general and absolute power of appointment. But she has no such power. With regard to penal Acts, and Acts which impose duties on

the subject, Courts cannot go upon conjecture; *Williams v. Sangar*, (a) *Denn d. Manifold v. Diamond*, (b) and *Brandling v. Barrington*, (c) all of which decide that statutes of that class must be construed strictly. And in *Rex v. Barham*, (d) Lord TENTERDEN said, "Our decision may, perhaps, in this particular case, operate to defeat the object of the statute; but it is better to abide by this consequence, than to put upon it a construction not warranted by the words of the Act, in order to give effect to what we may suppose to have been the intention of the legislature." To make the parties here liable to legacy duty, is to put a construction on the Act not warranted by its words, and only adopted on the supposition that it is in accordance with the intention of the legislature. In *Cockburn v. Harvey* (e) it was held, as it was in the cases above referred to, that a statute which varied or took away the rights of parties ought to be strictly construed. Applying these principles to this case, it is clear that no duty is payable. The power is not for the benefit of Judith Ann Platt, for she could not sell, pledge, nor charge the fund, nor even make it the subject of a contract. An appointment, even for a

* 270 * valuable consideration, made during her life, and not by will, would not give the appointee any right, but the fund would go to the person entitled to take in default of appointment. *Reid v. Shergold*. (g) All the authorities on this point are collected in Sugden on Powers, (h) where it is said that "a power to be executed by will cannot be executed by any act to take effect in the lifetime of the donee of the power."

[THE LORD CHANCELLOR. — She might exercise the power in one way for her own advantage, for she might contract debts, and might make the creditor the appointee.]

She could only do that by nominating the creditor by

(a) 10 East, 66.

(b) 4 B. & C. 243.

(c) 6 B. & C. 467, 475.

(d) 8 B. & C. 99, 104.

(e) 2 B. & Ad. 797.

(g) 10 Ves. 370.

(h) 2 edit. p. 209, and Vol. II., p. 27, last edit.

will; and no engagement to provide for a creditor by will would be taken by any one as a security on which he might advance money. But it is not her property merely because it may be subject to her debts, for it may be so subjected by the directions of another person; *Jenney v. Andrews*, (a) where an appointee was held to be a trustee for creditors; such, at least, is the marginal note of that case, though the case itself does not seem to be in point. The marginal note does not give the decision, but merely the observation of the Vice-Chancellor. *Townshend v. Windham* (b) was relied on by the Exchequer; but there the power of appointment was not testamentary only, but might be exercised by deed or will.

Then comes the question, whether the second legacy duty can be imposed. She appointed persons all of whom, except one, were strangers. Were they liable to pay duty as appointees of Judith Ann Platt? That depends on the 7th section of the statute, which clearly does not include them, for what they are to receive is not to be "satisfied out of the personal * estate of the person so * 271 dying." In the Court of Exchequer, Lord ABINGER said: (c) "The same reasons which induce us to put this construction on the 18th section," namely, that of holding the power to be a general and absolute power, "also appear to us to establish that, according to the true construction of the 7th section, the property subject to the power was personal estate, which Mrs. Platt had power to dispose of as she should think fit." It is difficult to say what words there are in the will which at all justify such a construction; and yet, unless that construction can be maintained, the legacy duty cannot be payable by her appointees, because the property given to them does not fall within the provisions of the statute.

The two appeals having been appointed for hearing the same day,

The counsel for Mr. Drake, after having argued the points

(a) 6 Mad. 264.

(b) 2 Ves. Sen. 1.

(c) 6 M. & W. 790.

raised on his appeal, proposed to continue the argument on his behalf, in answer to the case made on the appeal presented by the Attorney-General.

The counsel representing the Attorney-General opposed this, contending that the two appeals ought to be argued separately. They presented distinct subject-matters of consideration.

THE LORD CHANCELLOR. — In cross appeals, which are frequent in Scotch cases, the appeals are always heard together.

The Counsel for the Crown. — Then the appellants will have the reply to the Crown, even in the Crown's own appeal.

THE LORD CHANCELLOR. — Which appeal was first entered?

The appeal for Mr. Drake appeared to have been first entered.

* 272 * **THE LORD CHANCELLOR.** — Then his counsel must go on as in the ordinary case of an appeal and cross appeal.

Mr. Tiney proceeded: Then as to the probate duty. It is clear, on the decision of the Court below, that this is not the property of Judith Ann Platt; and it is also clear that she had not a general and absolute power of appointment. On this point, *The Attorney-General v. Hope*, (a) *The Attorney-General v. Staff*, (b) *Palmer v. Whitmore*, (c) *The Attorney-General v. Dimond*, (d) *Vandiest v. Fynmore*, (e) and *In re Cholmondeley*, (g) are all in point to show that probate duty is not payable here.

(a) 1 Cr. M. & R. 530; 2 Clark & Fin. 84.

(b) 2 Cr. & M. 124.

(c) 5 Sim. 178.

(d) 1 Cr. & J. 358; 1 Tyr. 243.

(e) 6 Sim. 570.

(g) 1 Cr. & M. 149; 3 Tyr. 10.

Mr. Pemberton Leigh, (a) on the same side. — The decision of the Court below cannot be supported. It is inconsistent with itself. It decided that this was not the property of Judith Ann Platt, and therefore was not liable to probate duty; and yet, on the other hand, it was dealt with for the purpose of legacy duty as if it was her property. The question, under these circumstances, will be, whether this is not a *casus omissus* in the Act; and if so, whether there is any jurisdiction in a Court of justice to supply the omission. The Act imposes a duty on legacies given from the personal estate of the party who makes the bequest. That would not as of course affect an estate disposed of by a person under a simple power of appointment. The Court held here that Judith Ann Platt was possessed of the estate by virtue of a power in the will of her father. If the legacy duty is payable on such an estate, it is because * there * 273 is an absolute power of appointment, or because the power is in favour of persons specially named or described in the will. It is not pretended that here any person was specially named or described in the will of John Ramsden, as a person to be favoured. Then was the estate possessed by Judith Ann Platt equivalent to a life-interest with a general and absolute power of appointment? It cannot be said that it was so; for, first, there is a forfeiture of the power in the event of her contracting a marriage with certain individuals mentioned in the will of John Ramsden; secondly, the power is to be executed only by will; and thirdly, certain classes of persons are excluded from the benefit of her exercise of this power. This case does not in terms, and it cannot by implication, fall within the provisions of the statute. The Courts can no more tax by implication than they can kill by implication. It is not sufficient to say that the legislature would have carried this object into effect had such a will as this been contemplated. The legislature has not done it, and the Court cannot supply the supposed deficiency. The judicial committee of the Privy Council has recently acted on this rule, in a case brought by appeal from the Isle of Man, where

(a) *Mr. Pemberton* had just taken the name of Leigh.

the revenue officers had seized some French brandy imported into the Isle of Man as spirits of wine. (a) In like manner, testamentary deeds with a power of revocation have been held not to be within the Act, though they were clearly within its intention. The 7th and the 18th sections are the only sections which have any reference to this subject. The 7th section imposes the duty where the property is the property of the party making the bequest. It was held in the

Court below that this was not the property of Judith
* 274 Ann Platt, * the person making the bequest. It is clear, therefore, that it is not liable to the legacy duty.

The 7th section also introduces the case of property disposed of by a power "to dispose of the same as he or she shall think fit." If the power is an absolute power, then the property is the same as the property of the party disposing of it. The 7th section puts them both on the same footing. But the Court has already decided that this is not the property of Mrs. Platt for the purposes of probate duty; and if so, it cannot be her property for the purposes of legacy duty. Then comes the 18th section, which relates to a power of disposing in favour of certain persons specially named or described. That is not the case here, and the sort of power which does exist here is not one falling within the provisions of the Act. It was said in the Court below, that the Act included all kinds of powers; but it is clear that that is not the case. If it is said that this is equivalent to a general power, because the fund might be seized by creditors, it is submitted that such a construction is in no way warranted. Nor can it be called an absolute and general power of appointment, since certain classes of persons are excluded from taking any benefit under it, and the person in whom the power is vested cannot exercise it in her own favour. Suppose an estate given to an individual subject to a contingency by which the gift may be defeated, such an estate could not be called an absolute estate. The 17th section of this very statute shows the distinction that exists between an estate like this and an absolute estate, and makes the different

(a) Apparently the case of *Barrow v. Quirk*, 2 Knapp, 79.

possessors liable to different rates of duty. The legislature must therefore be taken to have considered these different kinds of estate, and to have intentionally made the distinction between contingent interests and contingent powers.

The legislature * says in that section that a gift upon * 275 a contingency is not an absolute gift, but still it shall pay as if it was; but it has not created any such provision with regard to a contingent power. There is no authority for saying that a power depending on a contingency is an absolute power, or that the property to which it relates thereby becomes assets for creditors. What is said in *Jenney v. Andrews* on that subject is a mere *obiter dictum*; the case itself was decided entirely on another ground. The possibility that frauds may be committed should the construction now contended for prevail, is not of itself an answer to the argument; nor can a Court, in deciding on the construction of a statute, look to such possible consequences. This is not only an Act for imposing duties, and therefore to be strictly construed, but it is a penal Act, and is therefore doubly subject to the rules requiring a strict construction of its provisions. If so construed, it is impossible to say that the appellants can be made liable to this claim of legacy and probate duty, for the power of appointment is contingent and not absolute; there is an exclusion of a certain class of persons from its benefits, and it could only be exercised by will, and could not at any time be exercised by the possessor in her own favour.

Mr. Twiss, for the Crown.

THE LORD CHANCELLOR. — We wish you to begin with the question of probate.

Mr. Twiss. — It must be assumed for the purpose of this argument, that the power in this case is a general power. The property ought to pay duty on each fresh devolution.

[THE LORD CHANCELLOR. — Is it a new devolution of the property; does it not come to the appellant under the will of John Ramsden?]

* 276 * No ; the property passed under that will to Judith Ann Platt. That was a completed transaction ; but when it had once become annexed in that manner to her estate, it could not pass to another person without again becoming liable to legacy duty. In the Court of Exchequer and at the Rolls, the question whether there were two devolutions or not was waived, so that it must be assumed that there were two devolutions ; and if so, then it is clear that the property is liable to the legacy duty, and consequently to probate duty. *Palmer v. Whitmore* (a) is in point. There it was held that where a testator having a general power of appointment over a fund, exercises it by will, probate duty must be paid in respect of that fund. And the reason there given, that probate was necessary for the purpose of giving effect to the exercise of the power, applies distinctly to this case. *The Attorney-General v. Staff* (b) is to the same effect. There the additional argument was used, that the property was never the property of the person in whom the power was vested. It was held that that circumstance did not make any difference ; but if it did, the exemption from liability would not arise, for that circumstance existed in the same manner in the case of *Palmer v. Whitmore*, where the donee of the property had received it from the relations of his wife, having become entitled to it under a settlement. To all intents and purposes this was the personal estate of Mrs. Platt. That is shown upon the authority of *Vandiest v. Fynmore*. (c) There it was held that the probate duty did not attach : for what reason ? Because the power was created by will,

* 277 and was to be exercised by will. * That case is a very strong one ; for there no restriction on the power, except that of exercising it by will, was imposed by the testator. There the Vice-Chancellor expressly took and acted upon the distinction between powers created by deed and powers created by will, and founded his judgment on the distinction. That distinction was pressed upon the Court of Exchequer in this case ; but that Court expressed its entire dissent from that part of the

(a) 5 Sim. 178.

(b) 2 Cr. & M. 124.

(c) 6 Sim. 570.

opinion of the Vice-Chancellor. There can now be no doubt that no such distinction exists: if so, then as the judgment in *Vandiest v. Fynmore* proceeded wholly upon that distinction, the distinction being removed, the case becomes an authority for the Crown. And it is further to be remarked, that there the Attorney-General was not before the Court; the only parties being the executor and the appointees, and the interests of the Crown were not therefore sufficiently protected.

The Court of Exchequer thought that other cases must be overthrown before it could act on the authority of *The Attorney-General v. Hope*, (a) which is not only adopted as the authoritative decision of this House, but with which it expressed its concurrence as being conformable to the spirit and intention of the Act. Ultimately, indeed, the Court went further, and declared that the property here was not property which but for the will might have been administered by the Ordinary; and for that reason decided against the claim for probate duty. The Court of Exchequer mistook the reasons and the principle of the case of *Attorney-General v. Hope*. In Story's Conflict of Laws (b) it is said, "It has hence become a general * doctrine of the common * 278 law, that no suit can be brought or maintained by any executor or administrator in his official capacity in the Courts of any other country except that from which he derives his authority to act in virtue of the probate and letters of administration there granted to him." The probate duty is clearly not payable in respect of the fund on which the probate is to operate, but in respect of the authority which the probate gives over the fund. There is no pretence for saying that the executor should pay probate duty on a probate which could be of no use, as for one where the property was out of the jurisdiction in which the probate was issued; but here it is within the jurisdiction, and the probate would give the title to the property. That is the clear principle on which *The Attorney-General v. Hope* proceeded; and so considered, it is plain that the cases referred to are not in opposition to it.

(a) *Ante*, Vol. II., p. 84.

(b) Last edit. § 513.

[THE LORD CHANCELLOR. — The Court of Exchequer put it in this way: “In that case the House of Lords held that probate duty was not payable in respect of such parts of the testator’s assets as were situate in America at the time of his death; and the broad ground on which that decision rested was, that probate duty is granted in respect of such part only of the assets as the executor can recover by virtue of the probate, being in fact that property which but for the will the Ordinary would in early times have been entitled to apply *in pios usus*.” (a)]

- There is nothing in *The Attorney-General v. Hope* which could justify this reference to the power of the Ordinary; for it is there most distinctly shown that the Ordinary
- * 279 never could, under any possible circumstances, * have had any right whatever to interfere with this power of appointment, which the Court at the same moment declares to have been an absolute power of appointment. Under this general power, Mrs. Platt might have left the whole property to the uses of her will. Suppose a case of this kind: suppose two sisters, whose whole property is settled in joint tenancy, so that if either should die the whole would go to the survivor, but that the elder had a disposing power over part; if that part happened to be in a foreign country, there would be no probate duty on that part; but if it lay in this country, and she used her power in disposing of it, there must be a probate here, and consequently a probate duty, for without a probate her power could not be carried into effect. The case thus supposed exactly answers the present. The duty is payable, not on distribution by the Ordinary, but on the probate which authorizes the distribution of it. A probate is not wanted in cases in which the Ordinary has no jurisdiction, as in the case of a will of lands.

[LORD CAMPBELL. — The probate is necessary here, to show that the power is well executed. The power is a power to be executed by a will, and the probate is necessary to show the will.]

(a) 6 M. & W. 790.

But that would not be necessary in a will of lands, which is not authenticated by a probate, but is proved *per testes*. In *Holmes v. Coghill*, (a) Sir W. GRANT said, "there is no difference between a non-execution and a defective execution of a power;" and he observed at the same time, "there is an evident difference between a power and an absolute right of property; not so much with regard to the party possessing the power, as to the party to be affected by * the execution of it. There is no reason why the * 280 money a man has a right to raise should not be considered his property as much as a debt he has a right to recover." If this observation is well founded, if the property to be raised is like a debt to be recovered, then the right of the party to it is clear, and the duty must be paid to the government which guarantees the enjoyment of that right. *Bainton v. Ward*, (b) in Atkins's Reports, proceeded on that principle. It is more accurately reported in a note to *Holmes v. Coghill*. (c) The decree there declared the sum of 2000*l.*, which Ward had the power to appoint, and of which he made an appointment by his will, was to be considered part of his personal estate, and therefore liable to the satisfaction of his debts. The same thing was held in *Pack v. Bathurst*, (d) for "being made subject to the testator's appointment, it ought to be considered as part of his personal estate." The trustees here are trustees for any use which Mrs. Platt may appoint. The money was as much hers, in their hands, as any exchequer bill would have been hers while in the hands of her bankers. Had the persons who obtained this estate by virtue of her appointment, come into possession of it in default of appointment, as the estate would get the benefit, it must pay the probate duty. It is the same thing when the same benefit is got by an appointment. In the course of the arguments in this case in the Court of Exchequer, the Court inquired from what fund this money was to be paid. The fund here is clearly ascertained. The executors, either by a bill in equity or on petition, might ask and would obtain

(a) 7 Ves. 499, 506.

(b) 2 Atk. 172.

(c) 7 Ves. 499; see 502, n.; also 2 Ves. Sen. 2.

(d) 3 Atk. 269.

leave to sell out the amount. Then, again, the Court
* 281 below, quoting * *The Attorney-General v. Staff*, where
it was said, "the property, by the execution of the
power of appointment, became liable to her debts, and be-
came her personal estate; she had an absolute control over
it;" asked this question, "if this be the correct test, as to
the liability to probate duty, it will include the case of a
power to appoint a sum to be raised out of real estate as well
as the power to appoint personal estate; and surely it would
be a strange anomaly, that probate duty should be payable in
respect of a charge on real estate created by virtue of a power,
when it is clear no such duty is payable where the charge is
created by the owner of the fee-simple." In other words, the
property would not pay as land; but when it was the subject
of appointment as severed from land, it would become liable.
The Master of the Rolls said that this was not property which
the executors could have recovered by probate; but it is
clear that here the property is something which Mrs. Platt
might have left to the uses of her will, and her executors
might have recovered under the probate. The schedule of
55 Geo. 3, c. 184, imposes a duty "where the estate and
effects for or in respect of which such probate, &c., shall be
granted, exclusive of what the deceased shall have been pos-
sessed of or entitled to as a trustee for any other person, shall
be above," &c. An argument was raised on these words in
the Court below, and it was insisted that the duty was not
payable in respect of every thing for which probate was
granted, but only in respect of the estate of the deceased in
respect of which probate was granted. And this restriction,
it was said, was founded on the words of the 38th section,
which speaks of "the estate and effects of the deceased for or
in respect of which" the probate is to be granted. But
* 282 this mode of argument * is incorrect. The schedule
explains the provisions of that section, and ought to
have been so considered, and then it would have been clear
that property, which a person has the power of applying to
all the uses of his will, is property which, in the language of
the Act, he died possessed of or entitled to, property which
constituted his "estate and effects;" or, at all events, if

what he "dies possessed of" will cover his own property, all that he "dies entitled to" will cover the other.

[LORD COTTENHAM. — Here the donee of the power has no property in title or in possession, but has power to do an act which will give title. And that power she has by a will, — by a will which has already paid the probate duty. Here has been but one change of property, yet you want the probate duty to be paid twice over.]

That is not admitted. It is contended that there has been a change of property by the original will, and another change under a power to dispose of it.

Mr. Romilly, on the same side. — It must be assumed, for the purposes of the argument on the question as to probate duty, that on the facts of this case this is an absolute power of appointment; that Mrs. Platt had by this deed the property for life, with a power of appointment by deed or will, and that in default of such appointment the property was to go over. She had the property for her own life, with the power to convert it to any uses she might please. It was a conditional property.

[LORD CAMPBELL. — She could not make it her own property during life.]

But she might treat it as her own on her death. The same rule must apply here as would apply to the husband's right to the *choses in action* of the wife; they are his property if he chooses to make them so; it is the same here.

* The property would be Mrs. Platt's, if she thought * 283 fit to perform the conditions. If the property became hers, then on the transfer of it to another person all the ordinary consequences would follow. It was assumed in the Court of Exchequer to be her property; if so, then it is clear that the probate duty attaches upon it. Suppose she had appointed the property to go in the same way as that in which it would go by the mere operation of the instrument under

which she had received it, and her appointee had done the same, and so on for ever ; can it be said that the probate duty would never be payable ? No such consequence was ever intended by the legislature. The property is the property of the donee of the power the moment she executed the condition of the donation. It is liable to the debts of the donee : why ? because it is property. If it is her property for life, with a special power, it is true that the special conditions of the power must be observed, but the existence of those conditions will not prevent it from becoming her property, for on performing them they are discharged, and the property becomes absolutely hers.

The case of *The Attorney-General v. Hope* does not apply here. It is true that the property there was given by will, but then it was not within the jurisdiction. It was clearly, therefore, not liable to probate duty. The right of jurisdiction establishes the title to probate duty. Property situated within the province of York, though passing under a will made within the province of Canterbury, and where most of the property is within this province, must still pay probate duty in York, because there must be a separate probate

* 284 for so much of the property as is within that * province ; that is on account of the right of jurisdiction. Here the property was within the province of Canterbury when the probate was granted. All property in the funds must have an owner ; who is the owner of this property ? Not the creator of the power, for he is dead ; nor the appointee, who becomes entitled in consequence of the exercise of the power, for he cannot take but by the act of the holder of the power. If not the property for life of the holder of the power, on her executing the power, it became hers on death. The Crown had originally jurisdiction in these matters, and granted it out to the Ordinary. (a)

[THE LORD CHANCELLOR. — The Ordinary could take nothing here.

LORD CAMPBELL. — He could only take what was left un-

(a) *Hensloe's Case*, 9 Rep. 38.

disposed of, what belonged to an intestate ; but here, if Mrs. Platt had died intestate, this property would have gone over.]

Suppose a gift to her of 12,000*l.* for life, with an absolute and general power of appointment, would not that be her property in every respect? It is said here that the legal estate was in the appointees ; that is not so. The fund would stand in the bank books in the name of Mrs. Platt's trustees, or in her own name. The appointee could not have the benefit of it without the assent of her executors, even under a bill filed ; they must be parties to such a bill.

[LORD COTTENHAM. — Do you take the rule as to parties in a suit to be indicative of their rights ?]

It is to be so taken. *The Attorney-General v. Staff* is in point. That case decides that it was made Mrs. Platt's property at the time of her death, by the act of her executing her power by a will made in her lifetime. In *Nail v. Punter*, (a) a woman entitled to a sum of stock *set- * 285 tled it on her marriage to her separate use for life, with power to her to appoint it by will only, but no trust was declared in default of appointment. After her marriage she signed a promissory note, and then appointed the stock to her husband ; and the Vice-Chancellor was of opinion that the holder of the note was not defeated thereby. And in the same case it was held, that if the husband claimed the fund as his wife's executor, he must pay probate duty on the amount of it. That case in substance contradicts *Vandiest v. Fynmore*, (b) on the question of a power of appointment created by deed ; while at the same time it shows that though the power is to be exercised by will, the property to be affected by it is considered as the property of the donee of the power.

[THE LORD CHANCELLOR. — If she owed debts and had a

(a) 5 Sim. 562, 563.

(b) 6 Sim. 570.

power of appointment, the Court of Chancery would say that she ought to appoint so as to discharge the debts.]

But equity would not make an appointment for her. If so, then the question would not be where the property was situated; and the case of *Attorney-General v. Hope* consequently does not apply. The absence of a primary fund for the payment of debts would not affect the question. A specific legacy could not become a primary fund for such a purpose. *Stone v. Forsyth* (a) shows that the will must be proved. There it was held that the will of a *feme covert*, authorized by a power in her marriage settlement cannot be given in evidence to show a title to personal property until it has been proved in the Ecclesiastical Court.

[THE LORD CHANCELLOR. — That is a mere question
* 286 of * evidence. The executor takes nothing under the will. The power is to be executed under the will. The proof of the will is the probate, but the executor takes nothing in the property appointed.]

That does not make any difference. It depends on whether the fund is the property of the testator. If the executor would be liable, should the property come to him, to pay the probate duty, the appointee must pay it. How can it be said here that the fund does not pass by means of the probate? If it does so pass, then it must be as the property of the appointer. The words of the statute are, "estate and effects for or in respect of which such probate or letters of administration shall be granted." Suppose the case of a married woman who has nothing but the appointed fund, but who has a power of appointment by will over such fund; it must be clear that the probate would be granted in respect of that fund.

[THE LORD CHANCELLOR. — It is not "estate and effects in respect of which probate," &c., but "property of the deceased

(a) Dougl. 707.

which he was possessed of or entitled to," on which the question arises.]

Then it is clear, that where there is a general power of appointment over property that by the performance of a condition will become the property of the donee of the power, the duty must be payable on each execution of the power, or the payment will be capable of being evaded by a succession of appointments, which would have the effect of creating a perpetuity in favour of those who paid nothing to the State.

[LORD COTTENHAM. — This condition infers a performance during the life of the donee.

THE LORD CHANCELLOR. — It was John Ramsden's property: he left by will a power of appointment; the power was to be exercised in a certain way; *namely, *287 by will: did that make it Mrs. Platt's property? Could she be said to perform the condition during her lifetime, so as to give herself a property in the subject-matter of the devise?]

She could. There are many ways in which an appointment by will could be made to enure to her benefit.

Mr. Tinney replied. — The decision of the Court below, as to the probate duty, is right.

THE LORD CHANCELLOR — without in form putting any question to the Judges present (*a*). — All the learned Judges who are present, and all the noble and learned Lords who have heard the argument, are of that opinion, and think that the judgment of the Court below ought to be affirmed. All are of opinion in favour of the appellant on that part of the case.

(*a*) Lord Chief Justice TINDAL; Justices COLERIDGE, ERSKINE, MAULE, WIGHTMAN, and CRESSWELL; and Barons PARKE, ALDERSON, and ROLFE.

As to the question of the liability to legacy duty, we all think that, taking the whole of the 18th section of the 36 Geo. 3 together, the latter part is merely meant to be distinguished from, but is not opposed to, the former. It amounts to nothing more than this, that by the former part of the clause, where a power of appointment is created "for the benefit of any persons specially named as the objects of such power," they are to be subject to the payment of the legacy duty, in respect of the benefit they receive under it; and according to the latter branch of the clause, the duty is to be imposed where the property is given "for a limited interest, and a general and absolute power of appointment is also given," which we think * 288 to be the case in this instance. Taking the whole together, the clause means to describe, as liable to legacy duty, property which was not subject to any power of appointment for the benefit of any persons specially named. The property here taken by Mrs. Platt for her life, was taken not subject to any power of appointment for any persons specially named, and is therefore subject to legacy duty in the hands of her appointees. But on the other hand, the property appointed was not property which, within the meaning of the Act as applied to the schedule imposing the probate duty, was so completely her property as to render it liable to that duty; so that the judgment of the Court below appears to be right in both instances. The judgment will therefore be affirmed.

We shall say nothing of costs in a case of this kind.

The judgment of the Court below was affirmed on both points, without costs.

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* THE TOWNSHEND PEERAGE.

* 289

1842.

False Assumption of Titles. Illegitimacy. Private Act of Parliament.

The wife of a peer of the realm left him in 1808, a year after their marriage, and instituted a suit in the Ecclesiastical Court for nullity of the marriage *propter impotentiam*. Dropping that suit soon afterwards, she went to live with another man, assuming the character of his wife by a marriage in Scotland, and during many years' cohabitation with him had several children, who were named after him and educated as his children; but in 1828 they and their mother assumed the name and titles of the peer. He generally lived abroad, had no access to his wife since she left him, but knew of her infidelity, and took no proceedings to dissolve their marriage or illegitimate the children. Upon the petition of his brother, heir presumptive to his titles, stating those facts, and alleging that the peer was likely to survive all the witnesses to them, and praying protection to the descent of the titles, —

The House of Lords *held* that the petitioner — although by law he might perpetuate evidence, regarding titles of honour, in Chancery — was entitled to have a private Act of Parliament; and on proof, to the satisfaction of both Houses of Parliament, of the facts above stated, an Act was passed to declare the wife's children not to be the children of the peer, but without dissolving the marriage.

May 30, 1842. May, June, and July 12, 1843.

IN May, 1842, a petition was presented to the House of Lords from Charles Vere Ferrars Townshend, Esq. (commonly called Lord Charles Townshend), stating himself to be the only brother and heir presumptive of George Ferrars, Marquis Townshend, Earl of Leicester, Viscount Townshend, Baron De Ferrars of Chartley, Baron Compton, Baron Townshend of Lynn, &c., and praying for inquiry respecting the descent of these honours, and the assumption of the style of Earl of Leicester, by Mr. John Margetts; and that their Lordships would provide such remedy, and adopt such proceedings, as to their Lordships might seem meet.

The petition stated, among other things, (a) that
 * 290 * on the 12th of May, 1807, the said Marquis Townshend (then commonly called Lord Chartley) was married to Sarah, the only child of William Dunn Gardner, of Chatteris, in the Isle of Ely, Esq.: that by marriage articles, dated the previous day, the said marquis (then Lord Chartley) covenanted that he would, either in the lifetime or within six months after the death of his father George Earl of Leicester, and of his grandfather George Marquis Townshend, or of the survivor of them, settle freehold estates of the yearly value of 4000*l.*, in trust for securing to the said Sarah 200*l.* per annum pin money, in addition to a like annual sum therein after provided for her; with remainder to himself for life, with remainder (subject as therein mentioned) to the first and other sons of the marriage, &c., and with an ultimate remainder to his own right heirs: and W. Dunn Gardner covenanted to pay the said marquis 15,000*l.*; and he settled the further sum of 25,000*l.* in trust for the younger children of the marriage; but in case there should be no child, then for such persons as the said Sarah, whether covert or sole, should by deed or will appoint: that for three months after the marriage, the marquis (then Lord Chartley) and his wife lived together in London, and then went on a visit to her father at Chatteris, where the marquis remained two days, but she remained until the November following, when she returned to London, and resided in one of the marquis's houses, he residing in another, until May, 1808, when she, without his consent, went to reside with her father, and they never met afterwards: that in November, 1808, she instituted a suit in the Ecclesiastical Court, for the purpose of having the marriage declared void *propter impotentiam*, stating in her libel that the marriage had never been, nor been attempted to be, con-
 * 291 summated: * that while that suit was pending, she eloped from her father's house with one John Margetts, a brewer of St. Ives, in Huntingdonshire, and they were married at Gretna Green, in October, 1809; and in

(a) See Vol. 74, Lords' Jour. (for 1842) pp. 236-246.

January, 1810, she was delivered of a son, who died soon afterwards.

The petition further stated, that by an indenture dated December, 1808, the said marchioness, in exercise of the power given her by the marriage articles, appointed all her contingent interest in the estate purchased with the 25,000*l.* settled in trust, in favour of her father, in the event of there not being any children of that marriage entitled thereto; and that her father and mother, by indentures dated November, 1810, appointed several estates, over which they had powers, to the use, after their own lives, of trustees during the life of the marchioness, upon trust to permit her to receive the rents for her separate use for her life, with remainder to the use of her first son, "whether his legitimacy should or should not be disputed, or be made or become a question in law or equity," in tail male; with remainder to the use of her second son, "whether his legitimacy should or should not be disputed, or be or become a question as aforesaid;" and the same words occurred with respect to any other children to whom she might give birth; and it was directed, that when her first son, or any other of her descendants, should come into possession of those estates, he or they should use the surname of "Dunn Gardner," instead of his or their then surname: that in the said month of November, 1810, the said marchioness and John Margetts arrived at the house of her father in London, where they remained until April, 1811, during the whole of which time they called themselves, and were called *by others, "Mr. and Mrs. * 292 Margetts," and passed as man and wife; and the servants were ordered by their mistress, the mother of the marchioness, to call her "Mrs. Margetts," and not "Lady Leicester"; (a) and the marchioness, when addressed by

(a) Upon the death of George Marquis Townshend, the grandfather of the present marquis, in September, 1807, the latter took the title of Earl of Leicester, his father becoming marquis on that event; and upon his father's death in July, 1811, he became Marquis Townshend; which titles his wife was, of course, entitled to take. The present marquis never took his seat in the House of Lords, having chiefly resided abroad at and since his father's death in the year 1811.

the title of "Lady Leicester," positively forbade that she should be so called, and said, "Never call me by that detestable name:" that in April, 1811, the said marchioness removed from her father's house, to a house, No. 2 Hunter Street, St. George's, Bloomsbury, which was taken by John Margetts on a lease for twenty-one years, commencing from Christmas, 1810; at which house they continued to reside until Christmas, 1840, always passing as man and wife, and (until December, 1823) using and being known by no other names than "Mr. and Mrs. Margetts:" that in that house, in July, 1811, the marchioness gave birth to a son, who received the name of "John," and was known by no other name than that of "John Margetts" from the time of his birth until December, 1823, when he assumed the title of "Lord John Townshend" (which he afterwards changed to that of "Earl of Leicester"): and that in June, 1812, she was delivered in the said house of another son, who received the name of "William," and was known by no other name than "William Margetts" until December, 1823, when he assumed the title of "Lord William Townshend."

The petition then stated, that in April, 1813, W. * 293 Dunn Gardner filed a bill in Chancery against the * said Marquis and Marchioness Townshend, and other defendants, among whom were the said infants John and William Margetts, by their titles of Earl of Leicester and Lord William Townshend, for compelling execution of the said marriage articles, particularly the covenant by the marquis to settle lands of the annual value of 4000*l.*, after the death of his grandfather and father as aforesaid, which events had happened; and the bill stated, among other things, that there were issue of the marriage the said two infants, and that the marquis and marchioness lived separate: that in March, 1814, the marquis put in his answer, denying that there was any issue of the marriage, he having never cohabited with the marchioness since May, 1808, and (after stating that she was living in adultery with Mr. Margetts and passing by his name) submitting to the Court, whether, in consequence of her bad conduct, he was bound to perform the said covenant. The petition stated the further proceedings

in that and in a supplemental suit, down to the decree which directed performance of the said covenant by the marquis.

The petition further stated that the marchioness was delivered of three other children, in June, 1815, July, 1816, and June, 1820, respectively, in the said house of John Margetts in Hunter Street, and they received the names of Rosa Jane, Frederick Thomas, and Lavinia Charlotte Sarah, and were all called by the surname of Margetts, until December, 1823, when they were called Townshend, and the said Frederick Thomas took the style of "Lord Frederick Thomas Townshend:" that during the whole period of thirteen years, from April, 1811, to December, 1823, within which time all the aforesaid children were born, the said marchioness and John Margetts lived together * in his said house in * 294 Hunter Street openly as man and wife, and were so considered and treated by their acquaintances, tradespeople, and servants; that she called herself, and was known and called only by the name of "Mrs. Margetts," as well by her own mother and father as by strangers and acquaintances, and (except in her answers to the bills in Chancery before mentioned) signed by no other surname: that all the aforesaid children, from their birth until December, 1823, were called by no other surname than that of "Margetts," and they called the said John Margetts their "father," and he on his part treated and acted towards them in every respect as his own children; and they were also considered as the children of the said John Margetts by their maternal grandfather and grandmother, the said W. Dunn Gardner and his wife: that John Margetts the younger (now calling himself "Earl of Leicester"), the eldest surviving son of the marchioness by John Margetts, was sent to Westminster School at Michaelmas, 1818, and was entered in the books of the master by the name of "John Margetts," which name he continued to bear in the school until Christmas, 1823; that on the 26th December, 1823, the marchioness caused her aforesaid five children to be taken to the parish church of St. George, Bloomsbury, where they were all baptized on that day by the name of "Townshend," and entered in the register there as the children of "The Most Noble George Ferrars Marquis

Townshend, and the Most Noble Sarah Dunn Gardner Marchioness Townshend:” that immediately after the baptism of the said children, the marchioness assumed the title of “Marchioness Townshend,” and gave directions to her servants to call her “my Lady,” and to call her said children “Lords and Ladies;” * and the said children were told no longer to call Mr. Margetts “father,” but “Sir:” that in October, 1825, the marchioness was delivered, in the house of the said John Margetts, in Hunter Street, of another son, who received the name of “Cecil,” and was called “Lord Cecil Townshend.”

The petition then set forth certain devises in the wills of W. Dunn Gardner and his wife, in favour of their two grandchildren, the said Lords John and William Townshend, for the purpose of showing that they (Dunn Gardner and wife) well knew that these and the other children of the marchioness were not children of the marquis, but of Mr. Margetts; and it also stated proceedings in a Chancery suit of *Wilkins v. The Marquis and Marchioness Townshend and Others*, including the marchioness’s eldest son, who in his answer filed in that suit in 1835, described himself as “the Honourable John Townshend, commonly called the Earl of Leicester,” and thereby admitted that “he did allege himself to be, as in fact he was, the eldest son of such marriage, and to be entitled by courtesy Earl of Leicester;” and he admitted that he did claim, as first tenant in tail expectant on the decease of the said George Ferrars Marquis Townshend, the benefit of such covenant as in the said bill in that behalf was mentioned to be entered into by the said indenture of the 11th day of May, 1807: that at the last general election (July, 1841) the said John Margetts the younger, calling himself Earl of Leicester, was elected to serve as a burgess in Parliament for the borough of Bodmin: that he was styled in the return to the writ, “the Honourable John Townshend, commonly called the Earl of Leicester;” and that he qualified as the eldest son of a peer of the realm: that the petitioner, * 296 not having * been either a candidate or an elector, could not himself petition the House of Commons against such qualification on the part of the said member for

Bodmin; and that to have procured such a petition from others would not only have been an abuse of the right of election petition, but a step to which the petitioner would have been averse, on account of its tendency to bring before another tribunal a question which it was their Lordships' peculiar right and privilege to determine: that until the month of December, 1841, the petitioner and his family did not consider themselves called upon to take any notice of the proceedings of the marchioness, or of her children by John Margetts, except by denying that such children were the issue of her husband the Marquis Townshend, in their answers to the bills in Chancery in 1814; but on finding that the most important privilege belonging to eldest sons of peers of the realm had been claimed by and allowed to John Margetts the younger, calling himself "Earl of Leicester" (he having declared such to be his *status* and his qualification to sit in the House of Commons), the petitioner, as the head of his family now in this country, and as being heir-presumptive to all its honours, considered it to be his duty to publish in the newspapers a letter, in which he detailed some of the facts of the case (as before stated), and strongly protested against the conduct of the said John Margetts the younger, in having assumed the title of "Earl of Leicester," and in pretending to be the son of the marquis.

The petition, in conclusion, stated that the petitioner was prepared to establish by evidence each and all the facts which he had before stated: that he was advised there were no means by which he could dispute * the legiti- * 297 macy of the said John Margetts the younger, calling himself "Earl of Leicester," in a Court of law: that some of the witnesses, by whom only many of the most important facts could be proved, were far advanced in life and in uncertain health; and other persons, whose testimony was material, refused to make any disclosures unless compelled by a Court of justice; but if any of these persons should happen to die in the lifetime of the marquis, it might be impossible to prevent an individual notoriously begotten and born in adultery from succeeding to the numerous honours of the petitioner's family: that in consequence of there not being any

property involved in the succession of the petitioner as heir to his said brother, he was advised that he could not file a bill in Chancery to perpetuate testimony; and he submitted that it would be not merely an anomaly, but an injustice to the families of peers, if, while the law provided means for securing the rights of inheritance of the humblest person in the kingdom to every kind of property, by enabling the party interested to perpetuate the evidence of witnesses in case of their death, no such means should exist with respect to the highest and most important right of inheritance, the dignity of a peer of the realm: that the petitioner, naturally anxious to secure to himself and his family the enjoyment of his and their legal rights, and to prevent the same from being lost by the success of an imposition so audacious as to be absolutely without precedent, nevertheless felt that their Lordships had at least an equal interest in the question; the petitioner, therefore, humbly submitted the difficulties and impediments under which he laboured, and the injustice which might arise as well to their Lordships and the peerage, as * 298 * to himself and his family, to the consideration of their Lordships, and prayed such remedy, &c., as before mentioned.

Upon the reading of the petition, the House of Lords appointed a select committee of their Lordships to search for precedents relative to the matters therein stated. On the 6th of March that committee reported:—

That they examined the journals, and other books of authority in the Parliament Office; and the only precedents they found relating to the matter referred to them were the following:—

The Case of 18th Feb., 1672.—“Upon reading the petition of Elizabeth Countess Dowager of Northumberland, (a) on behalf of herself and the Lady Elizabeth Percy, showing, ‘that one who calls himself James Percy (by profession a trunkmaker in Dublin), assumes to himself the title

(a) Wife of Josceline, 11th Earl of Northumberland, who died in 1670, S. P. M.

of Earl of Northumberland and Lord Percy, to the dishonour of that family ;' it is this day ordered by the Lords, &c., that the examination of the matter complained of in the said petition is hereby referred to the Lords committees for privileges, whose Lordships, having heard all such persons as are concerned therein, are afterwards to make report thereof unto the House." (a)

20th Feb., 1672. — " Upon reading the petition of James Percy, and after consideration had thereof ; it is ordered by the Lords, &c., that the said petition be and is hereby dismissed this House." (b)

And this committee, upon referring to the book containing the minutes of proceedings before the said committee for privileges, found that they proceeded to examine into the matter referred to them by the said order, and the following was the substance of the entries upon the subject, (c) *videlicet* : —

* " James Percy is directed to put in his answer, in * 299 writing, to the charge in the petition ; which he does, and afterwards puts in a petition of claim to the title, and also a pedigree, in addition to his answer ; and a month's time having been allowed to both parties for preparation, after examination of evidence and hearing counsel on both sides, it is ordered, that the House be informed of the difficulty of the case ; and that the committee are of opinion, that the House direct that his Majesty may be moved that the House may hear his (James Percy's) title."

Accordingly, on the 28th March, 1673, the Earl of Carlisle acquainted the House " that the Earl of Suffolk and himself had moved his Majesty to give the House leave to hear James Percy concerning his claim to the title of the Earldom of Northumberland and Lord Percy, &c., and his

(a) 12 Lords' Jour. 533 b.

(b) 12 Lords' Jour. 534.

(c) Comm. Priv. Book ; entry 24, 27 Feb., 1672 ; entry 27, 28 March, 1673.

Majesty gave leave to the House to hear and determine the same."

"Upon reading the petition of James Percy the same day, setting forth his claim to the said titles, and praying that he might be heard at the bar by his counsel to make out his claim, he and his counsel appearing at the bar, and also counsel on the behalf of Elizabeth Countess Dowager of Northumberland, who charged the said Percy to be an impostor in pretending to the said titles of honour; the House having fully heard the counsel of the said countess in opposition to the claim of J. Percy, who by his counsel refused to make out his claim, but prayed longer time for that purpose, upon which their Lordships offering that if he, by his counsel, would make appear any probability toward his claim, he should have further time allowed him, which he refused to do, notwithstanding he had a month's time given him by the Lords committees for privileges, at his own desire, to prepare for his defence; —

"After due consideration had of the premises, it was resolved by the Lords, &c., that both the petitions of the said James Percy for his claim to the title of Earl of Northumberland, &c., be dismissed." (a)

25th Nov., 1680. — "A petition of James Percy was read, desiring a day may be appointed for him to be heard,
* 300 to make * out his title to the earldom of Northumberland; and the question being put, 'Whether the petition should be rejected?' it was resolved in the affirmative;

"The Earl of Anglesey, *dissentiente*, for these reasons:

"1. Because the claim brought by Mr. Percy can be heard and examined and adjudged only in this House.

"2. It is a right due to the subject to petition this House, and the cause is not to be under prejudice, or rejected, till heard.

"3. It seems unprecedented, and against common right and the constant course of Parliamentary justice.

"4. By such way of proceeding he is barred of his appeal

(a) 12 Lords' Jour. 578 b.

from a dismiss in a former Parliament, which he can only have in this Parliament, before the grounds thereof are so much as examined." (a)

1st June, 1685. — "Upon reading the petition of Charles Duke of Somerset, and Elizabeth Duchess of Somerset his wife, (b) showing, 'that one James Percy falsely assumed the title of Earl of Northumberland, and praying that the House would take the former matters and proceedings upon the same case into their considerations;' it was ordered, by the Lords, &c., that the consideration of this petition, and the proceedings formerly had in this case, be referred to the Lords committees for privileges, whose Lordships were to consider thereof, and make report to the House of what they should think fit to be done thereon. (c)

"A packet of papers being found on the table of the House, superscribed, 'Percie's Petition of Complaint, and the two petitions that were wanting are annexed, humbly prayed that they may be read, and that justice may be had, and he shall ever pray. Equal justice do, or tell the reason why.' This superscription having been read, it was ordered by the Lords, &c., that the said packet of papers be referred to the committee of privileges, to open the same, and report to the House their opinion of what is fit to be done thereupon." (d) Sic in Journal.

* 28th May, 1689. — "The Earl of Bridgewater, by order of the Lords committees for privileges, reported, that their Lordships perused the proceedings that had been before the House on James Percie's petitions, and they found that the House, on the 28th of March, 1673, dismissed the said petitions, and resolved the next day to consider what further proceedings should be had against James Percie concerning the imposture; but that the House next day adjourned, so nothing more was done therein: that their Lordships were of opinion that there should be no counte-

(a) 13 Jour. 687, 688.

(b) Daughter and sole heir of Josceline, 11th Earl of Northumberland, who died 1670.

(c) 14 Jour. 24 a.

(d) 14 Jour. 38 b.

nance given to this petition, but that the House would please to appoint a day to consider what proceedings should be had against the said J. Percy concerning the imposture, pursuant to the said order of the 28th of March; and that their Lordships were also of opinion, that his again calling himself 'right and lawful Earl of Northumberland,' in the petition referred to the committee, after the House had dismissed his former petition to the same purpose, was insolent, and injurious to the House; besides, there were several scandalous reflections therein on the Duke and Duchess of Somerset, which their Lordships left to the censure of the House.

"Whereupon the House made this order (reciting the proceedings that had been taken), that this House will hear the counsel of his Grace the Duke of Somerset against the said James Percy, concerning the imposture, as also counsel for the said James Percy, on Tuesday, the 11th of June next." (a)

11th June, 1689. — "After hearing counsel this day at the bar for his Grace the Duke of Somerset, in pursuance of the last order, as also counsel for the said J. Percy, and due consideration had of what was offered on both sides, and the Lords judging that the pretensions of the said J. Percy to the earldom of Northumberland were groundless, false, and scandalous, their Lordships ordered and adjudged, that the petition of the said J. Percy be dismissed; and that he be brought before the Four Courts in Westminster Hall, wearing a paper upon his breast, in which these words shall be written, 'The false and impudent pretender to the earldom of Northumberland.' " (b)

* 302 * 16th March, 1761. — "Lord Willoughby of Parham reported from the Lords committees for privileges, to whom it was referred to consider of and make up a list of the peers of Scotland at the time of the Union, whose peerages were still continuing, that the committee considered the matter to them referred, and were of opinion, 'That they be directed to meet to consider further of this matter on the second Monday in next Parliament; and that an order be made that William Alexander, taking

The Case of
Henry Borthwick
and others.

(a) 14 Jour. 224 a.

(b) 14 Jour. 240 a.

upon himself the title of Earl of Stirling ; Henry Borthwick, taking upon himself the title of Lord Borthwick ; William Maclellan, taking upon himself the title of Lord Kircudbright ; and John Rutherford and David Dury, each of them severally taking upon himself the title of Lord Rutherford, do attend the House, by themselves, or by some person properly authorized for them, on that day, to show by what authority they take upon themselves such titles respectively : ' which report was agreed to by the House, and ordered accordingly.' (a)

14th December, 1762. — " Lord Willoughby of Parham reported from the Lords committees for privileges, that they had met and considered further of the matter to them referred, and had come to the following resolutions : —

" 1. That it is the opinion of this committee that H. Borthwick, taking upon himself the title of Lord Borthwick, and W. Maclellan, taking upon himself the title of Lord Kircudbright, not having taken any step towards the prosecution of their respective claims, ought, to all intents and purposes, to be considered as having no right to the said titles by them assumed, until they shall have made out their claims, and procured the same to be duly allowed in the legal course of determination ; and that until the same shall be so allowed, the said persons, or either of them, be not admitted to vote by virtue of either of the said titles, at the election of any peer of Scotland to sit in this House, pursuant to the articles of Union.

" 2. That it is the opinion of this committee, that the said H. Borthwick and W. Maclellan be ordered not to presume to take upon themselves the said titles, honours, and dignities, * until their claims shall have been allowed * 303 in due course of law, and that notice be given, &c.

" 3. That it is the opinion of this committee, that Charles Ross Fleming, taking upon himself the title of Earl of Wigtoun, having attended (pursuant to an order of the 16th of November last), by a person properly authorized for him, and

(a) 80 Lords' Jour. 92 b., 93 a.

undertaking to prosecute his said claim in a legal course of determination, be ordered to attend the committee again the 20th of January next.'

" Which report being read by the clerk, and the two first resolutions being read a second time, were severally agreed to by the House, and ordered accordingly ; and the agents for the said H. Borthwick and W. Maclellan were called in, and acquainted therewith by the Lord Chancellor ; and then the third resolution, being read a second time, was agreed to, and ordered accordingly." (a)

9th March, 1676.— " The House being moved,
Scotch and Irish
 Barons assuming
 coronets. that notice may be taken of such persons who, not being peers of this realm, use the coronets, titles, or other ensigns proper to the peers only, and likewise that whereas the King's Majesty hath been pleased to grant that the barons of England have and may wear and use coronets upon their coaches, which are likewise used by the barons of the respective kingdoms of Scotland and Ireland, it was ordered, that it be referred to the Earl Marshal of England, or his deputy, to examine the aforesaid matters of fact taken notice of ; viz., who those persons are who so assume the coronets, &c., and by what authority the barons of Scotland and Ireland do wear and use coronets ; and make report thereof to this House." (b)

The select committee also submitted to the
The Earl of
 Macclesfield's
 Case. notice of the House a private Act, 9 & 10 Will. 3, c. 11, " An Act for dissolving the marriage between Charles Earle of Maclesfeld and Anne his wife, and to illegitimate the children of the said Anne ;" and they subjoined extracts therefrom as follows : —

" Humbly sheweth and complaineth to your most
 * 304 excellent * Majesty, your true and faithful subject Charles Earle of Maclesfeld, that Anne, &c., wife to your said subject, &c., having an ample and sufficient provi-

(a) 30 Jour. 131.

(b) 12 Jour. 67.

sion for her support and maintenance, hath for severall yeares after her marriage to your said subject, lived wholly separate and apart from him, during which time she hath given herselfe up to a notorious, lewd, and dishonourable course of life, and has not only broken the bond of matrimony, but hath had children begotten of her in adultery, and hath used vile arts to have the said spurious issue, or one of them, to be imposed upon him your said subject as his owne issue, to the dishonour of your said subject and his family, and to the disinheriting of the reall and true heires of your said subject's honour and estate : for remedy whereof, may it please your most excellent Majesty, out of your princely goodness and compassion to your said subject's misfortune and calamity, and for the future support and comfort of himselfe and his family, that it may be enacted, and be it enacted, &c., that the said bond of matrimony, being notoriously and ^{Marriage dis-} dissolved. scandalously violated and broken by the manifest open adultery of the said Anne, be, and is hereby, enacted, declared, and adjudged to be from henceforth wholly dissolved, annulled, vacated, and made voyd to all intents, constructions, and purposes, as if the said Charles Earle of Maclesfeld and the said Anne had never been intermarried ; and it is hereby declared and enacted lawfull for the said Charles Earle of Maclesfeld hereafter to take unto him any other woman or women to his wife or wives successively in due and legall forme of marriage, &c. And it is further enacted and declared that every child and children which hath or have heretofore or shall hereafter be begotten of the body of the said Anne shall be, and are hereby, as to the said ^{Children bas-} Charles Earle of Maclesfeld, and his blood, fam- tarlized. ily, and estate, and to all other intents, constructions, and purposes relating to him or his posterity, family, or estate, enacted and declared to be, and shall be deemed, adjudged, accepted, and taken to be, bastards and illegitimate from their severall and respective births, and be, and each and every of them, and all and every person and persons issuing, descending, or comeing, or which shall issue, descend, or come from them or any of them, is and hereby from time

* to time and at all times disabled, made, and declared * 305

incapable and clearly barred to inherit, have, or hold any honours, manors, lands, tenements, rents, or other hereditaments whatsoever, as heir or heires, issue or issues, child or children of the said Charles Earle of Maclesfeld, &c. And be it enacted and declared, that all the manors, lands, &c., dignities, and tytles of honour of the said Charles Earle of Maclesfeld, shall be and stand in the same plight and condition, to all intents and purposes, as if there were no child or children borne of the body of the said Anne; and that all and every such person or persons who from time to time might, would, or should have been inheritable, or intended, construed, or taken to be inheritable to any of the manors, lands, &c., dignities and tytles of honour of the said Earle, if no child or children had been or shall be borne of the body of the said Anne, is, are, and shall be hereby deemed, adjudged, and made capable to inherit the same as if no child or children had been or should be borne of the body of the said Anne," &c.

No precedent being found to suit the case stated in the petition, a bill was introduced by Lord COTTENHAM, and soon passed into a law, intituled, "An Act for perpetuating Testimony in certain cases." (a)

On the 3d of March, 1843, a petition was presented to the House from the Marquis Townshend, Earl of Leicester (adding his other numerous titles) stating, among other things, (b) that at the general election in July, 1841, a person who was for many years known by the name of John Margetts, but who had since assumed the title of Earl of Leicester (alleging himself to be the son and heir-apparent of the petitioner), was elected for the borough of Bodmin, and was styled in the return to the writ, "The Honourable John Towns-
 * 306 hend, commonly called the Earl of Leicester:" * that he qualified himself to sit in the House of Commons as being the eldest son of a peer of the realm: that he who ventured so to assume the name and title, and who pretended

(a) 5 & 6 Vict. c. 69.

(b) See 75 Lords' Jour. pp. 59-61.

to be the eldest son of the petitioner, and who in that character actually enjoyed one of the privileges belonging to the eldest son of a peer of the realm, was not the son of the petitioner, but, as the petitioner believed, the son of the petitioner's wife, Sarah, Marchioness Townshend, by a Mr. John Margetts, lately deceased: that the petitioner not only felt himself deeply aggrieved by the unjustifiable conduct of the said person in so pretending to be the son of the petitioner, and usurping his name and the title which would belong by courtesy to the eldest son of the petitioner; but the petitioner submitted that one of the privileges of the peerage had been violated by the said person having qualified himself to sit in the House of Commons as the eldest son of a peer of the realm: that the petitioner was advised that a question of this nature was a matter peculiarly cognizable by their Lordships; and he therefore felt it his duty to state the following facts for their Lordships' consideration.

The petition then stated the petitioner's marriage with the marchioness in 1807; her elopements from his house in 1808, and from her father's in 1809, with Mr. Margetts, and her assuming his name instead of the petitioner's until 1823; also the births of her several children, and that they were first called Margetts, and in 1823 baptized as Townshends, &c. (as before stated in the petition of Lord Charles Townshend): that the petitioner never saw any one of the said children; was not informed by their mother, or by any person on her behalf, of their several births; and he knew nothing of his own *knowledge of their ex- * 307
istence; they were all baptized without the presence or knowledge of the petitioner or of any member of his family; the petitioner had not been called upon to contribute, and he never contributed to their maintenance or education, nor had he in any manner whatever recognized them as his children, or been consulted about them, or exercised any paternal authority over them; and he believed they had never been recognized by his family: that the petitioner had for many years been resident abroad, the marchioness, as he believed, remaining in England; and he had never on any occasion whatever seen or been in com-

pany with her from the 8th of May, 1808: that the person styling himself Earl of Leicester, and pretending to be the petitioner's eldest son, was born in July, 1811, more than three years after a final separation had taken place between the petitioner and his said wife, and after all communication between them had ceased: that when the petitioner was informed of the elopement of his wife with the said John Margetts, he immediately directed his solicitor to take proper measures for tracing her, and for obtaining a divorce from her; but owing to the embarrassed state of the petitioner's pecuniary affairs, no legal proceedings were instituted, although he was then and for many years afterwards most anxious to obtain a divorce from his said wife: that on the 1st of August, 1809, about three months after she had eloped with the said J. Margetts, the petitioner was informed that she was pregnant, and in consequence thereof he wrote to his late father, George Marquis Townshend, a letter (which was partly set forth in the petition, and contained the same

facts, but is not otherwise material): that the petitioner and his father were not * then upon friendly terms, and the petitioner was not, as he requested to be, furnished by his father with any pecuniary means to enable him to prosecute the measures he contemplated with regard to his wife and to obtain a divorce from her: that the petitioner was never indifferent to the rights of his family, but had constantly denied that he was the father of any child born of his said wife; and on two occasions he solemnly deposed in the Court of Chancery that he was not the father of the said person now calling himself Earl of Leicester, or of any of the children of his said wife then in existence. The petition then referred to the Chancery suits before mentioned in Lord Charles Townshend's petition; and added that all the facts therein before detailed were capable of proof at the bar of the House, by production of deeds, wills, &c., and by the parol testimony of respectable witnesses, who were then, like the petitioner himself, becoming advanced in years, and he was very anxious that the pretensions of the aforesaid issue of his wife to the *status* of his legitimate children should be investigated at their Lordships'

bar in the lifetime of the petitioner and their mother, when the facts could be best ascertained and the truth elicited, and justice best rendered to all parties concerned.

The petitioner, in conclusion, stated, that the said person calling himself "Earl of Leicester" had violated the privilege of the peerage by falsely assuming the said title, and that he may, in the assumed character of the eldest son of a peer of the realm, at any time enter their Lordships' House under the standing orders of the 19th of December, 1720, and 18th of April, 1788: he therefore prayed that their Lordships would allow him to substantiate *the * 309 allegations in his petition by evidence at the bar; and further, to adopt such effectual measures as may seem most expedient for vindicating their Lordships' privileges, and protecting the rights of the petitioner and his family.

On the same day a petition was presented from Lord Charles V. F. Townshend, (a) referring to his petition presented in the last session, and stating the material allegations and prayer therein and herein before, in substance, stated; and further adding, that since his said petition was presented he had obtained further evidence of the truth of the allegations therein contained, and discovered other facts and circumstances which showed that the said John Margetts, falsely calling himself "Earl of Leicester," and the other persons pretending to be the children of the Marquis Townshend, were not his lawful issue, but the fruit of the adulterous intercourse between the marchioness and John Margetts.

The petition then detailing, by way of supplement to the former petition, the alleged newly discovered facts, gave minute narratives of the various places of residence of the marchioness and John Margetts from the time of her elopement with him; of the places and times where and when each of their children was born, and extracts from the will of John Margetts in favour of the children, "whether legitimate or illegitimate." And the petitioner then submitted that, under the circumstances in this and in his former petition detailed, he was entitled to more summary and direct relief

(a) See 75 Lords' Jour. pp. 61-67.

than he could obtain under the provisions of the aforesaid

“Act for perpetuating Testimony in certain cases,”

* 310 under which he was advised he could * obtain no redress, either in law or in equity, against the injurious proceedings of the said John Margetts, still, notwithstanding the petition presented last session, falsely calling himself “Earl of Leicester,” and of the other children of the marchioness assuming the other titles and names of the family of Townshend. And the petitioner prayed for an investigation of the matters stated in his petitions, and that he might be allowed to prove at the bar that the said John Margetts and the other children of the marchioness were not the issue of the marquis, and that a bill might be brought in for declaring them illegitimate, and that such other proceedings might be taken as would effectually protect the rights of the petitioner and of his family, and secure the descent of the said several honours and dignities, now vested in the Marquis Townshend, in the blood of his ancestors.

The two petitions were referred to a select committee of peers, appointed the same day to search for precedents in relation to proceedings of a similar nature to those detailed in them. On the 6th of March that committee reported that they searched the journals for precedents bearing on the subject, and that there was no proceeding competent for relief of the petitioners except a bill; and if the House should be pleased to entertain the same, the committee recommended that it should be in the nature of a private bill, on the petition of Lord Charles V. F. Townshend. (a)

Upon such petition having been presented, and with leave of the House, a bill was brought in by Lord BROUGHAM, * 311 intituled, “An Act to declare the * Illegitimacy of certain Persons alleged or claiming to be Children of the Most Honourable George Ferrars Marquis Townshend.” And the same having been read a first time, it was ordered that it be read a second time on the 2d of May, with liberty to Lord Charles V. F. Townshend and all other parties concerned to be then heard by their respective counsel at the bar, for or

(a) 75 Lords' Jour. 71.

against the bill, and that witnesses might be produced on either side. (a)

On the 2d of May, Lord COTTENHAM moved that the order for the second reading of the bill be discharged; which motion, after debate, was negatived; and the second reading, &c., was ordered for the next day.

On the 3d of May the allegations in the preamble of the bill (b) were opened at the bar by *Mr. Austin*, with whom were *Mr. Cockburn* and *Mr. John Hildyard*, as counsel for the Townshend family. *Mr. Erle* and *Mr. Talbot* attended for *Mr. Margetts*, "Earl of Leicester," to oppose the bill. *The Attorney-General* attended on behalf of the Crown, by order of the House.

In addition to the cases and precedents stated in the report of the select committee, (c) the counsel for the bill cited others; viz., *Morris v. Davies*, (d) and cases there mentioned, as establishing the doctrine of law that the children of a wife, living apart from her husband without divorce and with opportunities of sexual intercourse with him, may, notwithstanding, be proved to have been begotten by an adulterer; and also cases stated in *Mr. Le Marchant's Report* of claims to the Gardner Peerage, and in *Sir Harris Nicolas' Treatise on Adulterine Bastardy*: and among *the * 312 precedents of bills referred to were, 1st, an Act for the bastardy of Lady Parr's children in the year 1542, (e) without dissolving the marriage between her and Lord Parr; 2d, an Act, in the same year, declaring the children of Elizabeth Burgh (born during her husband's lifetime) to be bastards; (g) and 3d, an Act passed in 1666 for the illegitimation of the children of Lady Ann Roos. (h) These several enactments are shortly stated in a note at p. 472 of the report of the *Banbury Peerage Case*, in the Appendix to *Mr. Le Marchant's Gardner Peerage Case*. (i) The presumption of law in the present case, as in those now referred to, in favour of

(a) 75 Journ. 86, 87, 109.

(b) *Vide infra*, pp. 316, 317.

(c) *Supra*, 298 *et seq.*

(d) 5 Cl. & Fin. 163.

(e) 1 Lords' Jour. 235 b.

(g) 1 Lords' Jour. 235 a.

(h) 12 Lords' Jour. 110 b.

(i) See also *Macqueen's Prac. in Parl. Div.*, pp. 468, 551.

the legitimacy of the children, was that which the promoters of the bill asked to be allowed to rebut by the evidence of witnesses, all of whom, they said, might, in the course of nature, die before the time arrived for deciding the question in the usual way before a committee of privileges; as the marquis, being only sixty-four years of age, might survive all the witnesses.

A great number of witnesses was examined during the better part of three days; their evidence (a) proved clearly that the children of the Marchioness Townshend were not begotten by the marquis her husband; and the opposition to the passing of the bill was put on quite different grounds, as well by the counsel for Mr. Margetts as by the Earl of DEVON and Lord COTTENHAM, insisting that it was inexpedient and contrary to all modern precedents to pass an Act bastardizing children while the marriage was allowed to continue, and it was therefore possible, in contemplation

* 313 of law, that children of that marriage might * yet be born; that the precedents referred to were passed in the time of Henry 8; and that in the more recent precedent, the case of Parker Earl of Macclesfield, the Act as well annulled the marriage between him and the countess as bastardized the children.

Mr. Erle, in his argument for Mr. Margetts, further contended that the Marquis Townshend had precluded himself from any relief by having, in 1824 and subsequently, proposed, for a pecuniary consideration, to acknowledge the legitimacy of all the children; and it was because Mr. Dunn Gardner had not offered enough that the negotiation was broken off. At all events, the Earl of Leicester was not to blame in what he did under the circumstances.

On the motion for the second reading of the bill, on the 16th of May, Lord BROUGHAM, referring to the arguments at the bar, and the suggestions of himself and other peers, said that the title should be altered in committee, so as to leave it

(a) 75 Jour. pp. 173, 250.

to the children — supposing the marriage of their mother with the marquis to have been void *propter impotentiam* — to prove themselves to be the lawful children of her and Mr. Margetts under their marriage at Gretna Green; and the name of the youngest child should be left out of the bill, as he was a minor, and without any lawful guardian to protect his interests. His Lordship, referring to the argument of *Mr. Erle*, said the relief by the bill was given not to the Marquis Townshend, but to the heir presumptive to the dignities, Lord Charles Townshend, the petitioner for the bill. As to Mr. Margetts, he was an innocent party, and no blame should fall on him or on the other children.

The bill was then, after debate, read a second time, * committed to a committee of the whole House, and * 314 reported with the above amendments: and on the 22d of May it was read a third time and passed: *dissentientibus*, Lord COTTENHAM, Earl of DEVON, Earl of RADNOR, Earl of WICKLOW, Lord MONTEAGLE of Brandon, Lord SOMERHILL (Marquis of Clanricarde), and Lord DINORBEN; who all signed the following protest, which contains a summary of the arguments urged against the bill by the counsel for Mr. Margetts, and by these noble Lords in the debates: (a) —

“1st. Because the bill is an invasion of the prerogative of the Crown and of the rights of the subject: of the prerogative of the Crown in adjudicating upon titles of peerage without any reference by the Crown, or leave given for that purpose; of the rights of the subject in adjudicating upon, and disposing of private interests and property, to the exclusion of the jurisdiction of the ordinary tribunals of the country.”

“2d. Because the only cases in which the interference by Parliamentary enactment in questions of private rights and property is excusable, are those in which the ordinary tribunals of the country have no jurisdiction, and cannot afford

(a) See Vol. 68, Hansard's Parl. Deb. p. 143 (3d series), and Vol. 69, pp. 412, 424, and 674; and the morning newspapers of the 3d, 17th, and 23d of May, 1843; where also may be seen the reasons given for the Bill, by the Lord Chancellor, Lord BROUGHAM, Lord DENMAN, Lord LANGDALE, and Lord CAMPBELL.

any remedy; but in the present case, the parties for whose benefit the bill is promoted have the same remedy as all other persons have, who are interested in questions which cannot be brought to immediate decision in the ordinary tribunals; and if the inadequacy of such remedy be admitted as a reason for Parliamentary interference, the same reason must

* 315 apply to all such other cases, * and it will be impossible, with justice, to refuse the same interference in any of them."

"3d. Because the alleged public scandal arising from the facts in evidence, and the alleged disgraceful conduct of some of the parties to the transactions disclosed, furnish no grounds for the interference by Parliamentary enactment: the parties whose interests are intended to be affected by the enactment were not parties to such transactions, and the feelings which such transactions and conduct are calculated to excite ought to make Parliament particularly cautious in assuming functions of the ordinary tribunals, in which such feelings are not permitted to operate."

"4th. Because there must be in all cases great danger, in adjudicating by Parliamentary enactment upon private rights and interests between adverse parties, that there will not be that absence of feeling, influence, and favour, which is essential to the due administration of justice; and the difficulty and expense incident to such proceedings must confine the benefit of them to comparatively few."

"5th. Because the only remedy which Parliament is enabled to apply in the present case is in itself inadequate, and affords no inducement for departing from the ordinary mode of administering justice; the necessary omission of the youngest child, because he has not attained the age of twenty-one years, proving that the remedy cannot be applied until twenty-one years after the commencement of the grievance, by the birth of a child whose legitimacy is disputed; and the effect of the enactment being only to substitute the youngest child so omitted in the place of the eldest, leaving the succession to the titles and estates in question subject to future litigation on behalf of such youngest child."

* The bill was sent to the House of Commons on the * 316 23d of May; and, having been passed through the usual forms and readings, after some debates, (a) but without alteration, was returned to the House of Lords on the 7th July, and it received the royal assent on the 12th of that month.

The Act so passed was intituled "An Act to declare that certain persons therein mentioned are not children of the Most Honourable George Ferrars Marquis Townshend;" and it recited, by way of preamble, that on the 12th day of May, 1807, the Most Hon. George Ferrars Marquis Townshend (then commonly called Lord Chartley) was married at the parish church of St. George, Hanover Square, &c., to the Most Hon. Sarah Gardner Marchioness Townshend, then Sarah Gardner Dunn Gardner, spinster: that on or about the 8th of May, 1808, the said Sarah Gardner Marchioness Townshend quitted the house of the said George Ferrars Marquis Townshend, in Gloucester Place, &c., and afterwards, in the month of May, 1809, or thereabouts, entered into an adulterous intercourse with one John Margetts, who then carried on the business of a brewer at St. Ives, &c.; and the said marchioness thenceforth lived and cohabited with the said John Margetts, and continued to carry on such intercourse with him during the remainder of his life: that during the time that the said Sarah Gardner Marchioness Townshend was so cohabiting with the said John Margetts, she was delivered of the several children hereinafter respectively mentioned; namely, a son who died shortly after his birth, another * son called John, another son called William, a * 317 daughter called Rosa Jane, now the wife of Charles Mottram, another son called Frederick Thomas, since deceased, another daughter called Lavinia Charlotte Sarah, and another son called Cecil Mina Bolivar: that from the said 8th day of May, 1808, when the said marchioness quitted the house of her said husband, there had been no intercourse or

(a) See Vol. 98, Commons' Jour. pp. 414, 434, 441, 452, 456; Vol. 70, Hans. Deb. pp. 146, 204, 479; and the morning newspapers of the 21st of June, 6th and 8th of July, 1843.

cohabitation between her and her said husband: that the said children so born as aforesaid whilst the said Sarah Gardner Marchioness Townshend was so living and cohabiting with the said John Margetts are not the issue of the said George Ferrars Marquis Townshend: that the said first-mentioned son and the said son called Frederick Thomas both died infants, and unmarried. The Act then proceeded thus:—

“And whereas the said son called John hath assumed and uses the title and style of the Right Hon. John Townshend, commonly called Earl of Leicester, and hath claimed and claims the privileges of an eldest son and heir-apparent of the said George Ferrars Marquis Townshend; and others of the said children herein before named, in like manner have assumed and use the titles and styles to which they would respectively be entitled by courtesy if they were the lawful issue of the said George Ferrars Marquis Townshend:

“And whereas Charles Vere Ferrars Townshend, Esq. (commonly called Lord Charles Vere Ferrars Townshend), is the next and only brother of the said George Ferrars Marquis Townshend, and will inherit his honours if the said marquis die without lawful issue:

“And whereas there is danger that the said children herein before mentioned, or some or one of them,
 * 318 may * be accounted legitimate, to the dishonour of the peerage of this realm, to the grievous prejudice of the said Charles Vere Ferrars Townshend, and the disinheriting of the real and true heirs of the honours of the said marquis:

“Therefore your Majesty’s dutiful and loyal subject, the said Charles Vere Ferrars Townshend, most humbly beseecheth your Majesty that it may be enacted, and be it enacted by the Queen’s Most Excellent Majesty, by and with the advice, &c., that the said several children of the said Sarah Gardner Marchioness Townshend, herein before respectively mentioned, are not, nor were, nor shall they or any of them be taken to be, or be deemed the lawful issue of the said George Ferrars Marquis Townshend.

The children of Sarah Gardner Marchioness Townshend declared not to be lawful issue of the marquis.

“Provided always, that inasmuch as the said son called Cecil Mina Bolivar being an infant and having no lawful guardian, notice of the application for this Act could not be duly served upon him or upon any person in his behalf; be it therefore enacted, that neither this Act nor any thing herein contained shall be binding upon the said son called Cecil Mina Bolivar.”

Act not to be
binding upon the
son called Cecil
Mina Bolivar.

* FARRAN v. BERESFORD.

* 319

1842.

WILLIAM FARRAN *Plaintiff in Error.*
JOHN CLAUDIUS BERESFORD and CATH- } *Defendants in Error.*
ERINE MARY OTTIWELL }

*Judgment. Revivor. Stat. 3 & 4 Will. 4, c. 27. Pleading ;
Departure.*

To a writ of *scire facias*, issued in 1837 by the executors of the conusee of a judgment recovered in 1810, against the heirs and terre-tenants of the conusor, one of the terre-tenants pleaded the 40th section of the Statute 3 & 4 Will. 4, c. 27; to which the executors replied a judgment of revivor, recovered by themselves within twenty years before the issuing of the *scire facias*.

Held by the Lords (agreeing with the unanimous opinion of the Judges of England, and reversing a judgment of the Court of Exchequer Chamber in Ireland) :—

- 1st. That the plea was a sufficient answer to the claim stated in the writ.
- 2d. That the replication was a departure from the writ, and therefore bad on general demurrer.
- 3d. That a new right accrued to the executors by the judgment of revivor recovered by themselves.¹

Semble, that if the executors had issued the *scire facias* on the judgment revived by them within the twenty years, the statute would not have barred the claim.

¹ See *Farrell v. Gleeson*, 11 Cl. & Fin. 702.

Seemle, that the Irish Statute 8 Geo. 1, c. 4, § 2, is repealed, so far as judgments are concerned, by the Statute 3 & 4 Will. 4, c. 27, § 40.

June 30; July 1, 1842. March 6; August 18, 1843.

THE questions raised on the record in this case will be better understood by premising a short statement of the facts: On the 16th of March, 1810, John Claudius Beresford, as assignee of Henry Ottiwell and John Cockburne, bankrupts, and the said Henry Ottiwell, demised to John Dunbar, in consideration of 500*l.* as a fine, a dwelling-house and premises in the city of Dublin, for lives renewable for ever, at the yearly rent of 120 guineas. Dunbar paid 100*l.* of the fine, and for the residue he passed four bonds, in the penalty of 200*l.* each, on which Henry Ottiwell obtained judgments in the Court of King's Bench in Ireland, * 320 as * of Hilary term, 1810; one of the bonds was paid, and the judgment thereon satisfied; the others remained unpaid. Henry Ottiwell died in 1813, having by his will appointed the said J. Claudius Beresford and his wife Catherine Mary Ottiwell his executors. In that year also Dunbar assigned his interest in the lease of 1810 to the plaintiff in error, for 341*l.* 5*s.*, the premises being then subject to the three judgment debts, of which the plaintiff in error alleged that he was then wholly ignorant. These judgments were revived by *scire facias* against J. Dunbar, in Trinity term, 1817, in the names of the defendants in error, as executor and executrix of H. Ottiwell.

By the record it appeared, that on the 31st of January, 1837, a writ of *scire facias*, tested as of that day, was issued by the defendants in error as executors of Henry Ottiwell, out of the Court of King's Bench in Ireland, reciting a judgment recovered by the testator in Hilary term, 1810, for 200*l.* debt, and 2*l.* 9*s.* 6*d.* costs, against J. Dunbar, since deceased, and directing the sheriffs of the county of the city of Dublin to make known to the heir of Dunbar, and to the tenants of the lands, &c., of the said J. Dunbar, in 1810, to show cause why the plaintiffs should not have execution against them, &c. (in the usual form).

The plaintiff in error having been served as one of the

terre-tenants, pleaded to the *sci. fa.* two pleas; First, that no part of the principal money secured by the judgment in the *sci. fa.* mentioned, nor any interest thereon, was paid, nor was any acknowledgment of the right thereto given in writing, signed by J. Dunbar or by his agent, or by any other person or persons by whom the said judgment was payable, or by the agent of any such person, to H. Ottiwell, or to any other person entitled thereto, within twenty years

* next before the time of the suing out of the writ. * 321

Secondly, that a present right to receive the said debt and damages accrued to a person capable of giving a discharge for and a release of the same, more than twenty years before the suing forth of the writ of *sci. fa.*, and that no part of the principal money of the said debt and damages, nor any interest thereon, was paid, nor any acknowledgment of the right thereto given in writing, signed by the said J. Dunbar or by his agent, &c., to the said H. Ottiwell, or to the executors, or to any or either of them, or to any other person entitled thereto, within twenty years next before the time of the issuing of the *sci. fa.* (a)

To these pleas, the defendants in error replied a former *sci. fa.*, issued at their instance in Michaelmas term, 1817, to revive the same judgment; and that such proceedings were had thereon, that it was afterwards considered by the Court of King's Bench that they should have their execution against J. Dunbar for the debt, damages, &c.

To this replication the plaintiff in error filed a general demurrer, in which the defendants in error joined. The case was argued before the Court of Queen's Bench in Michaelmas term, 1837, and judgment of execution was awarded to the defendants in error. (b)

The plaintiff in error brought a writ of error on that judgment in the Exchequer Chamber in Ireland, where the judgment of the Court of Queen's Bench was affirmed, *dis-sentiente* Mr. Baron FOSTER. (c)

The present writ of error, brought to reserve both those

(a) See the Statute 3 & 4 Will. 4, c. 27, § 40.

(b) 6 Law Rec. (2d series) p. 10; 1 San. & S. 218, n.

(c) See Ottiwell v. Farran, 2 Irish Law Rep. 110 (3d series).

- judgments, was argued in the presence of the learned
- * 322 * Judges of the Common Law Courts, (a) on the 30th of June and 1st of July, 1842.

The Solicitor-General and *Mr. Wordsworth*, for the plaintiff in error. — It is a difficult task, and requires much confidence in the case of the plaintiff in error, to contend against a judgment which has the sanction of two Courts, and of all the Judges in Ireland, except one. (b) It appears that three judgments had been entered up on so many bonds in 1810 against a Mr. Dunbar. He was then and for some time afterwards in possession of some freehold property, which he assigned to the plaintiff in error and other persons for valuable consideration. There is no doubt that this property was then affected by those judgments, and they were revived in 1817 against Mr. Dunbar. The *scire facies* issued in 1837 applied to one of those judgments of 1810, without taking any notice of the revival in 1817. The plaintiff in error knew nothing of the demand thus made, having purchased the property in ignorance of any charge of this nature. He appeared to the writ, and pleaded the recent Statute of Limitation. The plaintiffs below then replied the revival in 1817 as sufficient to take the case out of the statute, the twenty years' limitation not having expired from the date of that revival to the issuing of the present writ of *sci. fa.* Upon demurrer to that replication, the case came before the Courts, whose judgments are now brought under the consideration of this House.

- The question turns on the construction of the 40th
- * 323 * section of the Statute 3 & 4 Will. 4, c. 27, which was intended by the framers of it to be a general law applicable to Ireland as well as to England. No person,

(a) The Judges present were, Lord Chief Justice TINDAL; Barons PARKE, ALDERSON, GURNEY, and ROLFE; Justices PATTESON, WILLIAMS, COLERIDGE, COLTMAN, MAULE, WIGHTMAN, and CRESSWELL.

(b) See this case, 6 Law Rec. (2d series) p. 10, and 2 Ir. Law Rep. 110 *et seq.*; Crofts v. Hewson, 5 Law Rec. (2d series) 263; Kealey v. Bodkin, 1 Sau. & Scul. 211; Finch v. Fitzgibbon, 6 Law Rec. (2d series) 312; and Ryan v. Cambie, 2 Ir. Eq. Rep. 328.

reading that section carefully, can entertain a doubt that it is a bar to any proceeding in 1837 upon a judgment obtained in 1810, on which there was no payment in the mean time or principal or interest, nor any acknowledgment given in writing by the party liable thereon that any debt was due. The enactment by the 40th section is, "that after the 31st of December, 1833, no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." A present right to receive the amount of this judgment accrued in 1810 to Mr. Ottiwell, and after his death to his executors and personal representatives, and he and they were capable of giving a discharge for the same. That right existed for twenty years, but not after the expiration of twenty years, unless the case falls within the exceptions contained in the same section; that is, first, "unless in the mean time some part of the principal money, or some interest thereon, shall have been paid;" or, secondly, unless "some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent; and in such case no such action, &c., shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given." It is not alleged that there was any payment ever made in * respect of this judgment, or that * 324 there was any acknowledgment of the debt in writing by any person; so that this demand does not fall within either of the exceptions.

The writ of *scire facias* reviving this judgment in 1817 was not such an action, suit, or proceeding as can be held to defeat the objects of the legislature in putting an end by this Act to stale dormant demands. The plaintiffs below say by their replication that they ought not to be precluded from having execution for the debt against the lands whereof the

defendant is tenant; because they say, "after the rendition of the judgment in the *sci. fa.* mentioned, and within twenty years next before the issuing of the said *sci. fa.*, that is, in Michaelmas, 1817, another *sci. fa.*, to revive the said judgment was duly issued, and such proceedings were had thereon, that the Court of King's Bench considered that they, the plaintiffs below, should have execution," &c. There being no allegation that any notice of that *sci. fa.* was given to Mr. Farran, as required by the Irish Act 9 Geo. 2, c. 5, it is fair to presume that he had no notice of it, and that the judgment was revived against Dunbar alone or his executors; but Dunbar had then sold the freehold lands, and they were in possession of Farran. The suing out a *scire facias*, and keeping the revived judgment in one's pocket, is not such a proceeding as will take the claim out of the statute. A judgment of revival does not give a "present right to receive" the debt; a "present right to receive" the debt on the judgment accrued in 1810, and not in 1817; there was in 1810 a person liable to pay, and having freehold lands bound by the judgment: there was also a person entitled to receive the money and to give a discharge for it. The limita-

* 325 tion began to run from 1810, and was not * stopped by the revival of the judgment in 1817, or by the death of Dunbar, or absence of his representatives. *Hickman v. Walker*, (a) *Rhodes v. Smethurst*. (b)

But the Judges in Ireland suppose that the Irish Act 8 Geo. 1, c. 4, § 2, is not repealed by the recent general Act. By the second section of the Irish Act it is enacted, "that to any action or suit in law or equity for recovery of any debt due by single bill, bond, or judgment, &c., and payable twenty years before such action or suit brought, where no action or suit had been prosecuted for recovery thereof, nor any interest or money had been paid, or other satisfaction made on account thereof within twenty years before the commencement of such action or suit, the defendant might plead payment in bar; which plea was to be effectual, unless the plaintiff or those under whom he claimed had commenced or

(a) Willes, 27.

(b) 4 M. & W. 42.

prosecuted some action or suit for the recovery of such debt, or should prove that some interest or money had been paid or other satisfaction made on account thereof, within twenty years before such action or suit commenced." Upon the construction of that Act in Ireland, it has been held that the revival of a judgment by *scire facias* was sufficient to prevent the operation of the twenty years' limitation, without any notice or other act. But, without discussing the correctness of that construction, it must be presumed that the framers of the Act of 3 & 4 Will. 4, c. 27, had the exception in that Act of 8 Geo. 1, and the interpretation put on it, present to their minds; and, therefore, in order to prevent exceptions by implication to be added to those expressed in the statute, they were precise in defining the exceptions in the 40th section of the new Act. And accordingly the Courts in this country allow no * other exceptions than those * 826 mentioned in the statute; for that would be, as Chief Baron ALEXANDER said in *Berrington v. Evans*, (a) to "en-graft another exception on the Act of Parliament." That Act must, in fact, be held not to extend to Ireland at all, if the Act of 8 Geo. 1, c. 4 is admitted still to prevail there. The Judges in Ireland having all, except Mr. Baron FOSTER, (b) and perhaps also Sir M. O'LOGHLEN, in a case which came before him at the Rolls, (c) taken one view of this section of the Act, and holding that every revival of a judgment by *sci. fa.* renews the debt, this was a proper case to be brought before the highest tribunal, as it would be highly inexpedient that the same construction should not be put on the Act in both parts of the empire.

[THE LORD CHANCELLOR. — Suppose the debtor under a judgment has no lands or goods, and he neither pays nor gives an acknowledgment of the debt in writing, but conceals or absents himself until the twenty years have run, is the creditor's remedy barred, although he revived the judgment in the mean time?]

(a) 1 You. & C. 440.

(b) 2 Ir. Law Rep. 122 (3d series).

(c) *Kealey v. Bodkin*, 1 San. & Scul. 211.

That is our construction of the Act. But in the case just put, the creditor having the judgment might proceed by *elegit* against the land, or by outlawry of the debtor. It has been decided, that if a legatee of an annuity charged on land forbear for twenty years from the testator's death to proceed by distress or action to recover the annuity, he is barred. *James v. Salter.* (a) And in a case of mortgage, — which is also mentioned in the same section, — if a mortgagee receive no payment of principal or interest, nor a written ac-
 * 327 knowledgment of his right * thereto for twenty years, he is barred of all remedy. Why should a judgment creditor be considered to have better protection than a mortgagee?

[LORD CAMPBELL. — A judgment may be revived by *sci. fa.* different from a mortgage, which gives the owner other remedies by foreclosure or ejectment.]

The object of reviving the judgment in 1817 was to affect the lands of the debtor. The record does not state that he had any lands then, and therefore it is to be presumed that he had then parted with them.

Every revival of a judgment is a new judgment, and not an award of execution: *O'Brien v. Ram*; (b) and the law now declares that you shall not enforce a judgment after twenty years, unless it falls within the exceptions in the Act. To enforce this judgment because there was a judgment of revivor in 1817 would be in effect to repeal the Act, or engraft thereon another exception in addition to those contained in it.

The plaintiffs below declared on the original judgment of 1810 only, keeping out of view the judgment of revival in 1817. If it should be held that the limitation of time is to be reckoned not from the date of the original judgment but from the date of the judgment of revival, then as the *sci. fa.* states the original judgment only, and not that which was

(a) 3 Bing. N. C. 544.

(b) 3 Mod. 170, 188; s. c. Comb. 103; Carth. 30; Hob. 97.

revived, the defendants in error are barred of their remedy, and the replication is a departure in pleading, and therefore bad. *Hickman v. Walker.* (a)

Mr. Fitzroy Kelly and *Mr. Henderson*, for the defendants in error. — The judgment in this case was pronounced after the most mature consideration in both the Courts * of Queen's Bench and Exchequer Chamber in Ire- * 328 land; it had the deliberate sanction of all the Judges of those Courts except Mr. Baron FOSTER, and it is sustained by similar decisions in all the Courts, both of Law and Equity, in that country. *Kealey v. Bodkin*, (b) *Crofts v. Hewson*, (c) *Finch v. Fitzgibbon.* (d) The final decision of this House is looked for with great anxiety. A vast deal of property has been vested in judgments in Ireland, especially after the passing of the Irish Act of 9 Geo. 2, c. 5, which rendered securities by judgments there assignable, conferring on the assignees the rights of the original creditors, and enabling them to revive the judgments, and sue and give discharges in their own names. The general Act of Geo. 4, c. 35, recognized the efficacy of judgments of revival. The consequence is, that at this time judgments are the ordinary securities in Ireland, as mortgages are in England, and have become the subjects of family settlements to a vast extent; so that the adoption of the construction of the recent Act 3 & 4 Will. 4, c. 27, contended for by the plaintiff in error, would practically destroy a large amount of property, which at the time of the passing of that Act possessed unquestioned validity and value; and would render judgments, the most solemn records, all but worthless, — really of no more value than a verbal promise. Unless, therefore, the words of the Act are direct and imperative, they ought to receive that construction.

The argument for the plaintiff in error amounts to this: first, that more than twenty years having elapsed since

(a) Willes, 27.

(b) 1 San. & Scul. 211; s. c. 5 Law Rec. 224 (2d series).

(c) 5 Law Rec. 263.

(d) 6 Law Rec. 812.

* 329 the rendition of the judgment in 1810 against * John Dunbar, the claim of the defendants in error is barred by the 40th section of the 3 & 4 Will. 4, c. 27 ; and, secondly, that the *scire facias* having recited that first judgment only, the replying the judgment in the *scire facias* of 1817 was a fatal departure in pleading. If the argument on the first point be sound, the result would be that a dishonest debtor, who has neither lands nor goods available for payment of his debts, would only have to go out of the way until the limitation of the statute has run ; and the creditor, having no means of keeping the judgment alive, and nothing to operate upon, would lose the benefit of it altogether, unless he had obtained — what was impossible for him — an acknowledgment of the debt in writing, or part payment of the principal or interest. It could not surely be the intention of the legislature, in passing this Act, to favour dishonest debtors, and to deprive honest creditors, using due diligence, of their valuable securities, without any sort of notice to the parties holding them. If such a construction were to prevail, titles to property of great extent in Ireland would be entirely destroyed. The Irish Act, 8 Geo. 1, c. 4, § 2, limiting within twenty years proceedings for recovery of debts due by judgment, &c., has been held to be no bar where an action or suit has been prosecuted for recovery thereof within twenty years before the commencement of such proceedings. It was never doubted that judgment in *sci fa.* prevented the bar created by that statute from applying ; and upon this construction, prevailing ever since that statute passed, judgments revived by *sci. fa.* were universally considered as creating a lien on lands, and as having all the existing efficacy of the original judgment, with the superadded right of immediate execution.

* 330 A writ of *sci. fa.*, reviving a judgment, is * a continuance of the original judgment, and not a creation of a new debt or lien ; but a new and also a present right accrues under it. The recent Act does not operate retrospectively, so as to affect this claim, which, at the time the Act passed, was clearly valid and effectual under the Irish Act 8 Geo. 1, c. 4. It is material to attend to the distinction between securities by judgment and securities by mortgage.

If a judgment creditor cannot keep alive his security by *scire facias* from time to time, he may lose the whole benefit of it, through the dishonesty of the debtor ; but a mortgagee, if he cannot obtain payment or further security within twenty years, may resort to the mortgaged premises, and file a bill of foreclosure or bring an ejectment, and so get possession of the land. It is not to be argued that a declaration by *sci. fa.* is not within the description of action, suit, or other proceeding ; it is equally clear that a judgment revived, a matter of solemn record in our Courts, is better evidence of a debt than a simple acknowledgment in writing.

[LORD BROUGHAM. — The legal as well as the rational presumption is, that if a creditor lies by for twenty years, his demand has been satisfied.

THE LORD CHANCELLOR. — A present right to receive the debt in this case accrued in 1810 ; did not the time begin to run then ?]

Another right, and a present right, too, to receive the same debt, accrued in 1817 ; the *scire facias* gave a new operation to the judgment. The words in the 40th section are not “ first accrued.” The word “ first ” is prefixed to the word “ accrued ” in the other sections of the Act, but is omitted in this section.

It was argued, that the revival of the judgment in 1817 was a proceeding against Dunbar and executors, *and no notice of it was given to the plaintiff in *331 error, who was then tenant of the lands. Service of a *scire facias* on a party already bound by a judgment is not necessary. Here, however, there is no doubt, in fact, that the plaintiff in error was served ; and it is not to be inferred from the omission of that allegation on the record that he was not served. The revived judgment is matter of record, and therefore presumed to be known to all concerned.

[THE LORD CHANCELLOR. — Although it is generally pre-
[285]

sumed *omnia rite acta*; still is it not necessary to allege that all requisites of the Act 9 Geo. 2, c. 5, were complied with, as in the execution of a power in a deed ?]

A record is different from a deed; the one is open to all, the other is a private matter between the parties to it. The revived judgment in 1817, giving a fresh security and a present right to receive the debt, estopped all parties and privies to it from denying that such right then accrued. From that time the limitation began to run.

If the argument for the plaintiff in error on the main question is untenable, as we submit it is, then there is no necessity to discuss the other objection; and on that point it may be sufficient to say, that the replying the revivor of the judgment of 1817 involved no departure in pleading. That judgment affirmed and maintained the original judgment, which was the foundation of the revived judgment. *Buller v. Cole.* (a) There is no inconsistency, therefore, much less is there a departure in the pleading.

The Solicitor-General replied.

* 332 * The following questions of law were put by the Lord Chancellor to the learned Judges : —

“ 1. Whether, upon the whole matter appearing on this record, the plaintiffs below (defendants in error) are entitled to judgment ?

“ 2. Whether the matter pleaded in the replication is sufficient to bring the claim of plaintiffs below within the exception of section 40 of 3 & 4 Will. 4, c. 27 ?

“ 3. Whether the matter pleaded in the replication is a departure from the replication ? ”

The Judges desiring time to consider the questions, the further consideration of the cause stood over till the session of 1843.

(a) Cro. Car. 258.

March 6, 1843.

LORD CHIEF JUSTICE TINDAL. — My Lords, in answer to the first question proposed by your Lordships, we are of opinion that upon the whole matter appearing on this record, the plaintiffs below (the defendants in error) are not entitled to judgment.

The foundation of the proceedings in this case is a judgment for 200*l.*, recovered by Henry Ottiwell in Hilary term, 1810. The writ of *scire facias* of the 31st of January, 1837 (which is now under consideration), states the judgment of 1810, the death of Henry Ottiwell, and the appointment of the plaintiffs below as his executors; and prays execution of that judgment. So far as the record shows, the money sought to be recovered by the plaintiffs below was secured by that judgment of 1810, and none other.

The defendant below has then pleaded, in the very words of the 40th section of the Statute 3 & 4 Will. 4, c. 27, that a present right to receive the same debt and damages accrued to a person capable of * giving a discharge for * 333 and a release of the same, more than twenty years before the suing forth of the said writ; and negatives the payment of any part of the principal or interest, and the giving of any acknowledgment in writing, signed as required by that section. The facts stated in the plea are not denied; and if the matter rested there, no doubt could be entertained as to the sufficiency of the plea. For as to the observations made in the course of the argument at your Lordships' bar, upon the great hardship upon the plaintiffs below, and upon other judgment creditors in Ireland, if this Statute of 3 & 4 Will. 4, c. 27, § 40, should be applied to judgments in Ireland, which by Statute of 9 Geo. 2, c. 5 (Irish), are made assignable, and often form the subject of securities and family settlements, we cannot but think such observations entitled to little weight, if the words of the statute are clear and intelligible, as in the present case they are; inasmuch as in such case no hardship follows, except upon those who have slept over their rights, in the entire disregard of the provisions of a public Act of the legislature.

But the replication, admitting the allegations in the plea,

states the further facts, that in Michaelmas term, 1817, the plaintiffs below sued out a writ of *scire facias* on the judgment of 1810, and obtained judgment and award of execution; and this judgment in *scire facias* is said to confer a new right upon the plaintiffs below, and therefore it is argued that the twenty years mentioned in the Statute of 3 & 4 Will. 4, c. 27, are to be reckoned from the date of the latter judgment; viz., Michaelmas term, 1817.

To some purposes, as it seems to us, the judgment in *scire facias* did confer a new right. The writ of *scire* * 334 *facias* was not necessary merely for the purpose * of reviving the judgment of 1810, after the lapse of a year without execution; it was also necessary for the purpose of making the plaintiffs below parties to that judgment, as executors of Henry Ottiwell; and they could not even within a year have sued out execution, without first proceeding by writ of *scire facias*, though they might have brought an action of debt on the judgment.

The cases of *O'Brien v. Ram*, (a) and *Barnard and Tugser's Case*, (b) and a case in Fitzherbert's *Natura Brevium*, 122, writ of debt (the entry of which case is to be found in *Rastal*, 193), were cited among others to show that an action of debt will lie upon a judgment in *scire facias*, and thereby to establish that a new right is conferred by such judgment. Whether these cases may be distinguishable from the ordinary case of a writ of *scire facias*, merely to revive a judgment and an award of execution thereon, where there is no change of parties, it is unnecessary to determine; it may be the case, that where a new right is conferred by the judgment in *scire facias*, as in the present instance, the money sought to be recovered may fairly be considered to have been secured to the plaintiffs below by that judgment, within the true meaning of the 40th Section of the 3 & 4 Will. 4, c. 27. But we are not called upon to express an opinion on that point upon the present state of this record, for the replication is bad as being a departure; and the original claim on the judgment of 1810 is, as we think, barred by the statute.

(a) 3 Mod. 187.

(b) 4 Leon. 186.

By the words "a present right to receive the same," in the 40th section of the Act, we understand an immediate right without waiting for the happening of * any future * 885 event; and it cannot be doubted that such present right accrued to Henry Ottiwell in Hilary term, 1810, and continued in the plaintiffs below after his death; and as little can be doubted that both he and they were capable of giving a discharge or release for the money now sought to be recovered.

In the course of the argument it was contended, that the 40th section of the Statute of 3 & 4 Will. 4, c. 27, must be considered as qualified or restricted by the Irish Act 8 Geo. 4, c. 4, § 2, or by the Act 9 Geo. 4, c. 85. The latter of these Acts, however, does not relate to the parties to judgments, but only to the rights of purchasers of lands affected by them. And as to the former Act, although before the passing of the Statute of Will. 4, the Act of Geo. 1, which uses only the words "commenced or prosecuted some action or suit," &c., was construed to extend to a revival of a former judgment; yet as the recent statute contains certain definite precise exceptions in the 40th section, but no exception of judgments revived, we think, in legal construction, it is rather to be held that the latter statute has repealed the former, than that a new exception is to be engrafted into the 40th section; the more especially as such exception might have the effect of enlarging the time of proceedings for the recovery upon judgments to an indefinite period.

For these reasons, her Majesty's Judges are of opinion that the first question is to be answered in the negative.

For the same reasons we also think, in answer to the second question proposed by your Lordships, that the matter pleaded in the replication is not sufficient to bring the claim of the plaintiffs below within the exceptions mentioned in section 40. For the judgment in *scire facias* is plainly neither a payment nor an * acknowledgment in writing, signed * 886 by the person by whom the money is payable, or his agent.

In answer to the third question proposed by your Lordships, we are of opinion that the matter pleaded in the

replication is a departure from the declaration. We have already stated that the declaration is founded on the judgment of 1810, and prays execution of that judgment, and of no other; we have also stated that in our opinion the judgment in *scire facias* in 1817 conferred on the plaintiffs below a new right; and it appears to us to be a necessary consequence that the setting up that new right in the replication is a departure from the declaration, which proceeds upon the old right only.

If, indeed, the judgment in *scire facias* in 1817 could be properly said to bring down the judgment of 1810 to Michaelmas term, 1817, and to make it, as it were, a judgment of that term, then it would be incorrect to state that the judgment in *scire facias* conferred a new right; but even in that case there would be, as it seems to us, a departure in pleading; for the declaration states the original judgment to be of Hilary term, 1810, without more: whereas the replication would, upon such a construction, state it as a judgment in effect and substance as of Michaelmas term, 1817.

The distinction between this case and that of a subsequent promise, to take a case out of the Statute of Limitations, to which the present case was assimilated in argument, is that in the present case the replication insists upon a new right of action, not the same as that described in the declaration; in the other, the promise is given in evidence on the issue that the cause of action did not accrue more than six years
 * 337 before the commencement of the suit, as proof * of the promise laid in the declaration, and must agree with it.

It appears therefore to us, that in any way of viewing this case, the replication is a departure from the declaration.

LORD BROUGHAM. — In this case, I apprehend the proper course for your Lordships to take will be to postpone the further consideration of the judgment to be given upon this writ of error. The learned Judges do not agree, as it appears, with the judgment delivered in the Court below; and for that reason, as well as the importance of the point which is dealt with in the very learned and distinct opinion of the

learned Judges, it will be expedient, in my humble apprehension, if your Lordships should agree with me, to postpone the further consideration of this case for the present.

LORD CAMPBELL. — I see no reason to differ from the opinion which has been expressed by the learned Judges; but the case is of infinite importance, and although probably the point with respect to the departure will decide this case, yet the two other points are of very great consequence to Irish securities. I entirely concur with my noble and learned friend as to the expediency of postponing the judgment, because some legislation may be necessary, which of course could not affect this case, but with a view to other cases similarly circumstanced.

LORD BROUGHAM. — There is great anxiety on this subject in Ireland.

THE LORD CHANCELLOR. — I understand that the point as to the departure in the pleading will decide the case.

* LORD BROUGHAM. — No doubt; but it is a sub- * 338
ject of great anxiety, I know.

The Lord Chancellor begged, in the name of the House, to thank the learned Judges for the attention which they had bestowed upon these cases. (a)

August 18.

THE LORD CHANCELLOR. — The learned Judges were unanimous in their opinion; and the reasons upon which it is founded are so fully and satisfactorily stated by Lord Chief Justice TINDAL, that it will not be necessary for me to do much more than to state that I concur in that opinion, and recommend your Lordships to adopt it as the foundation of your judgment.

(a) The Judges had answered questions the same day in other cases before the House.

The plaintiffs below stated a judgment for 200*l.* recovered by Henry Ottiwell in 1810, on a writ of *scire facias*, of the 31st of January, 1837, sued out by themselves as his executors; and they prayed execution of that judgment. To this declaration the defendant below pleaded, in the words of the statute, "that a present right to receive the debt and damages accrued to a person capable of giving a discharge and release for the same, more than twenty years before the suing forth of the said writ;" and in his plea he negatived the payment of any part of the principal or interest, or the giving of any acknowledgment in writing of the debt within the same period of twenty years. These facts are not denied by the replication; but the plaintiffs below state that a former *scire facias* was sued out in 1817 on the judgment of 1810, and that execution was awarded thereon; and the question is as to the sufficiency of this replication, and

* 339 whether — * assuming the facts to be true, as they must be taken to be for the purpose of the present consideration — the plaintiffs below are entitled to recover.

I agree with her Majesty's Judges in thinking that in this case a new right was acquired by the judgment in *scire facias* of 1817. But the plaintiffs below having declared on the judgment of 1810, and the plea under the Statute of the 3d & 4th Will. 4, c. 27, being, as I think, a sufficient answer to the claim as stated in the writ, the plaintiffs below could not set up, by way of replication, a new right in answer to the plea. It is clear, I think, that this is a departure, and that upon the record thus framed, the defendant below was entitled to judgment.

LORD BROUGHAM. — I entirely concur. The Judges were unanimous in this case.

Lord CAMPBELL also concurred.

Mr. Wordsworth, on behalf of the plaintiff in error, applied for a return of the costs paid by him in the Court below.

THE LORD CHANCELLOR. — We reverse the whole of the

judgment below, as to the costs as well as the rest of the case.

(Ordered and adjudged, that the judgment given in the Court of Exchequer Chamber in Ireland, affirming the judgment given in the Court of Queen's Bench in Ireland, be and the same is hereby reversed ; and that the judgment given in the said Court of Queen's Bench be, and the same is hereby also reversed.)

* BURDETT v. SPILSBURY.

* 840

1842.

SIR FRANCIS BURDETT, Bart., and Others *Plaintiffs in Error.*
 JOHN DOE, on the several Demises of
 the Rev. FRANCIS WARD SPILSBURY, } *Defendant in Error.*
 Clerk, and Another }

Power, Execution of. Attestation.

Lands were limited to such uses, &c., as L. H. W. should appoint by her last will and testament, in writing, to be by her *signed, sealed, and published in the presence of, and attested by, three or more credible witnesses.* L. H. W. signed and sealed an instrument (before Stat. 1 Vict. c. 26) containing an appointment commencing thus : " I, L. H. W., do publish and declare this to be my last will and testament ;" and ending thus : " I declare this only to be my last will and testament : In witness whereof I have, to this my last will and testament, set my hand and seal, the 12th day of September," &c. The attestation was thus : " Witness, C. B., E. B., A. B."

Held by the House of Lords (reversing a judgment of the Court of Exchequer Chamber, and concurring in the opinion of the majority of the Judges), that the attestation was sufficient, and that the power was well executed.¹

¹ This decision was confirmed in *Newton v. Ricketts*, 9 H. L. Cas. 262; *Osborn v. Cook*, 11 Cush. 532; *Bryan v. White*, 2 Rob. 315 ; 14 Jur. 791 ; *Burdett v. Spilbury*, 6 Man. & Gr. 886 ; *Ladd v. Ladd*, 8 How. (U. S.) 10; 4 Kent, 380, note (c) ; 1 Jarman Wills (8d Eng. ed.), 79, 108.

May 11, 12, 20; June 14, 1842. June 19; August 18, 1843.

THIS was an action of ejectment brought in the Court of King's Bench, by the defendant in error against the plaintiffs in error, to recover possession of lands in Derbyshire. The cause was tried at the Derbyshire spring assizes in 1834, and a verdict was found for the defendant in error, subject to the opinion of the Court of King's Bench upon a special case, with liberty to either party to turn the same into a special verdict. The special case was argued in the King's

Bench, and the unanimous judgment of that Court was * 341 for the plaintiffs in error. (a) The defendant * in error thereupon turned the special case into a special verdict, which, among other things not material to be here mentioned, stated that by indentures of settlement, dated the 4th & 5th December, 1787, and made on the marriage of Lydia Henning Ward with William Augustus Skynner, certain of the lands in question, of which L. H. Ward was seised in fee-simple, were limited after her decease, and in default of issue of the marriage, "to the use of such person or persons, for such estate and estates, upon such trusts, and to and for such ends, intents, and purposes, as she the said L. H. Ward, whether covert or sole, and notwithstanding her then intended or any future coverture, by her last will and testament, in writing, or by any writing purporting to be, or in the nature of, her last will and testament, or by any codicil or codicils thereto, to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses, should give, devise, direct, limit, or appoint; and for want of such gift, &c., to the use of the said L. H. Ward, her heirs and assigns for ever:" that the said marriage between L. H. Ward and W. A. Skynner was duly solemnized the 6th of December, 1787: that the said L. H. Ward or Skynner died the 30th September, 1789, in the lifetime of her said husband, without leaving any issue of the marriage, but leaving Benjamin Ward her uncle and heir-at-law surviving, and also leaving an instrument in writing, which was partly as follows:

(a) 4 Ad. & El. 1; 6 Nev. & M. 259.

"I, Lydia Henning Skynner, wife of W. A. Skynner, Esq., of, &c., do publish and declare this to be my last will and testament. I appoint my beloved husband W. A. Skynner my executor, and my beloved mother, Lydia Ward, executrix with him. I give to my beloved mother for her natural life, the rents, &c., of the messuage, * &c., and * 342 hereditaments at Etwall, &c., in the county of Derby, and after her death to go to my beloved husband W. A. Skynner, his heirs, &c., for ever." The instrument, after disposing of certain stocks, proceeded thus: "And as to all the rest and residue of my estates, real and personal, whatsoever and wheresoever, &c., I give, devise, and bequeath the same, and every part and parcel thereof, unto my beloved husband W. A. Skynner, his heirs, executors, administrators, and assigns, absolutely for ever, &c. I declare this only to be my last will and testament: In witness whereof I have, to this my last will and testament, contained in one sheet, set my hand and seal, the 12th day of September, in the year of our Lord 1789."

"Witness: LYDIA HENNING SKYNNER (L. S.).

"CHARLES BALL,

"ELIZ. BALL,

"ANN BALL."

(The instrument did not at all refer to the power of appointment.)

By the special verdict it was further found that the said instrument in writing, purporting to be the last will and testament of the said L. H. Skynner, was signed, sealed, and published by her in the presence of the said C. Ball, E. Ball, and A. Ball, and attested by them, and their attestation was in manner and form as appears on the said instrument: that the said B. Ward, the uncle and heir-at-law of the said L. H. Skynner, also departed this life in August, 1790, having by his will devised his estates, real and personal, to his nephew Benjamin Spilsbury, since deceased, of whom Francis Ward Spilsbury, one of the lessors of the defendant in error, is the eldest son * and heir-at-law, and the other lessor * 343 of the defendant in error is now the heir-at-law of the

said L. H. Skynner : that the said W. A. Skynner departed this life in February, 1838 ; and the plaintiffs in error claim title under him.

The judgment of the Court of King's Bench having been entered on this verdict, a writ of error was brought thereon in the Exchequer Chamber, where the same was argued in 1837 ; and the judgment of the King's Bench was reversed in 1839, by a majority of four to three Judges. (a)

SKYNNER v. SPILSBURY.

The present writ of error was brought to reverse that judgment. Another writ of error was brought at the same time, to reverse a like judgment, in an ejectment brought by the same defendant in error, on demise of the same persons, to recover other lands comprised in the same marriage settlement, and appointed by the said instrument, by L. H. Ward.

The only question in both cases — which came to be argued together — was, whether the said instrument was so executed and attested as to satisfy the terms of the power reserved to L. H. Ward in the settlement. The common-law Judges (herein after mentioned) were present at the arguments on the 11th, 12th, and 20th of May, and 19th of June, 1842.

Mr. Pemberton and the *Solicitor-General*, for the plaintiffs in error in both cases, argued generally (b) that the * 344 conditions and forms prescribed for the exercise * of the power given by the marriage settlement were duly complied with, by the executing and attesting of the will of the donee of the power in the manner found by the special

(a) 9 Ad. & El. 936; 1 Perry & Dav. 670.

(b) The full reports, before referred to, of the judgments in the Courts below, and the full statements of the opinions of the Judges that here follow, render it unnecessary to report the arguments of Counsel on this occasion : those for the plaintiffs in error are comprised in the opinions given by Lord Chief Justice TINDAL, Mr. Baron GURNEY, and Justices WILLIAMS, COLERIDGE, ERSKINE, MAULE, and WIGHTMAN. The arguments for the defendant in error are contained in the opinions delivered by Barons ALDERSON, PARKE, and ROLFE, and Mr. Justice PATTESON.

verdict; for that Lydia Henning Skynner signed, sealed, and published her last will and testament in the presence of three credible witnesses; and all that appeared on the face of the instrument itself.

The Attorney-General and *Mr. Bethell*, for the defendants in error, contended that the power authorizing Mrs. Skynner to dispose of the property by her will, required not only that it should be signed, sealed, and published in the presence of three witnesses or more, but also that the several facts of signing, sealing, and publishing of it should be attested by the witnesses; and there was no attestation or due publication of the instrument in question.

The following cases were cited and commented on: *Hands v. James*, (a) *Croft v. Pawlet*, (b) *Brice v. Smith*, (c) *M'Queen v. Farquhar*, (d) *Wright v. Wakeford*, (e) *Doe v. Peach*, (g) *Wright v. Barlow*, (h) *Doe v. Pearce*, (i) *Moodie v. Reid*, (k) *Stanhope v. Keir*, (l) *Buller v. Burt*, (m) *Ward v. Swift*, (n) *Hougham v. Sandys*, (o) *Simeon v. Simeon*, (p) *Lempriere v. Valpy*, (q) *Curteis v. Kenrick*, (r) *Mackenley v. Sison*, (s) *Brook v. Wilson*, (t) *Waterman v. Smith*, (u) *Allen v. Bradshaw*. (v)

* All these cases will be found again cited, and their * 845 application explained, in the subjoined opinions of the learned Judges.

At the close of the arguments, the following question was put to the learned Judges: "Was the power given to the

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| (a) Comyns's Rep. 531. | (b) Strange, 1109. |
| (c) Willes's Rep. 1. | (d) 11 Ves. 467. |
| (e) 17 Ves. 454; 4 Taunt. 213. | (g) 2 M. & Sel. 576. |
| (h) 3 M. & Sel. 512. | (i) 6 Taunt. 402. |
| (k) 1 Madd. 516; 7 Taunt. 355. | (l) 2 Sim. & Sta. 37. |
| (m) Cited in 4 Ad. & El. 15; 6 Nev. & M. 281, n. | |
| (n) 3 Tyrw. 122; 1 Cr. & M. 171. | |
| (o) 2 Sim. 95. | (p) 4 Sim. 555. |
| (q) 5 Sim. 108. | (r) 3 M. & W. 461. |
| (s) 8 Sim. 561. | (t) 6 M. & W. 473. |
| (u) 9 Sim. 629. | (v) 1 Curt. Ecc. Rep. 110. |

testatrix, Lydia Henning Ward, by the settlement of the 4th and 5th days of December, 1787, set forth in the special verdict, duly and effectually executed by her will, dated 12th of December, 1789, as stated in the said verdict? ”

The Judges desiring time to consider the question, the further consideration of the causes was postponed.

June 19.

The Judges again attended on the 19th of June, 1843, to deliver their answers to the above question; and the Lord Chancellor having acquainted the House that they differed in their opinions, it was ordered that they deliver their opinions *seriatim*, with their reasons.

Opinions of the
Judges.

MR. JUSTICE WIGHTMAN. — My Lords, upon the question referred by your Lordships to the consideration of the Judges, whether the will of Lydia Henning Skynner, stated in the special verdict, is or is not a good execution of the power contained in her marriage settlement, I am of opinion that it is.

By the power she is enabled to devise by her last will and testament, or any writing purporting to be such, “to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses.” An instrument in writing, purporting to be the last will and testament of Lydia Henning Skynner, was, in fact, signed, sealed, and published by her in the presence of three witnesses, and was attested by them, by writing their names under the word “witness.”

* 346 * The power does not require any form of attestation, but only that the instrument should be attested by three witnesses, in whose presence it should be signed, sealed, and published by the testatrix. No distinction can, I think, be drawn between the words “witness” and “attest;” nor does it appear to me that it would have made any difference if, instead of the words “in the presence of and attested by three or more witnesses,” the expression had been “in the presence of and witnessed by three or more witnesses;” and the case may be considered the same as if, instead of the word

“ witness,” written over the names of the three persons subscribing, the words had been “ attested by ” those three persons. The power, then, is literally complied with in its terms by the instrument in question ; it does purport to be the last will and testament of Lydia Henning Skynner ; it was signed, sealed, and published by her in the presence of three witnesses, and the three witnesses did attest the instrument by subscribing their names to it as such.

But it is said that when the power required the instrument to be attested by three witnesses, in whose presence the testatrix was to sign, seal, and publish it, more was necessary to fulfil that requisition than that they should merely write their names as witnesses. The power requires them to be witnesses of three things, — signing, sealing, and publication ; and it is said that the grantor of the power intended, when he required the will to be made in a certain manner, in the presence of three witnesses, and to be attested by them, that, to fulfil that requisition of the power which requires the attestation of three witnesses, they ought in terms to mention that they did witness the performance of the three things required to be done by the testatrix ; and that the merely signing their * names as witnesses is not enough, though they * 347 did, in fact, see all the formalities performed.

Independently of particular authorities to which I shall presently allude, it appears to me that this objection is not well founded. The power requires that the instrument should be signed, sealed, and published by the testatrix in the presence of three witnesses, and that they should attest the instrument. No form of attestation would have dispensed with the necessity, for the first thirty years, of calling one of the subscribing witnesses, if any were alive or in a situation to be called, to prove that the formalities required by the power had been complied with ; but after thirty years the case would rest upon the presumption arising upon the production of the instrument itself. In the present case the instrument shows a general attestation of it by three witnesses, without any statement of the particular facts they attested ; but they must be understood to have attested something, and to ascertain what that is, there is no principle of law nor any author-

ity, of which I am aware, that prohibits a reference to the instrument itself; and if we look at the instrument for information as to that which it is to be presumed the witnesses did attest or witness, what do we find? Upon the face of the instrument which the witnesses attest, the testatrix says: "I do publish and declare this to be my last will and testament: in witness whereof I have set my hand and seal to this my last will and testament;" and then follows a signature and seal, purporting to be those of the testatrix.

Can it be doubted but that the jury might presume that the witnesses, who do not specify what they saw, did see all that done which on the face of the instrument appears
 * 348 to have been done, and which it was * requisite for the testatrix to do to make a perfect instrument? But supposing such a special form of attestation as that contended for to have been adopted, it would not have varied the character of the evidence derived from the terms of the instrument and the general attestation of the witnesses; it would but have raised a presumption for the jury that they did witness that which is stated in the attestation, subject to any doubt that might be raised as to whether they really did witness that which is stated in the written attestation or not.

The Statute of Frauds requires that all wills of lands should be signed by the party devising, and be attested and subscribed in the presence of the devisor by three or more witnesses; but there is no doubt but that a general attestation would satisfy the statute. In the case of *Hands v. James*, (a) it was decided that, where all the witnesses to a will were dead, and it did not appear in the attestation clause that the witnesses set their names in the presence of the testatrix, it was a question for the jury, which they might determine upon circumstances, whether it was so or not; and the Court, in coming to that conclusion, said that the witnesses are required by the Statute of Frauds to set their names in the presence of the testator, but that the statute does not require that this should be noticed in the subscrip-

(a) Comyns, 531.

tion of the witnesses ; and in *Croft v. Pawlet* (a) it was held, upon the authority of *Hands v. James*, that a will of lands may be well executed, though it is not stated in the attestation that the witnesses signed in the presence of the testator. The same point was decided in *Brice v. Smith*. (b)

Independently, then, of express authority, and upon general principles, and with reference to the execution of wills under the Statute of Frauds, the terms * of the * 349 power appear to have been complied with. It is, however, said, that whatever may be the literal construction to be given to the terms of the power ; whatever may really have been the meaning of the person creating the power ; whatever might have been determined had this question arisen now for the first time, there is a series of decisions following and recognizing each other upon this very point, by which it is to be considered as settled and determined that to fulfil such a power as the present, there must be a formal attestation by the witnesses, showing upon the face of it that all the formalities required by the power have been complied with ; and unless these cases can be distinguished from the present, I should certainly not venture to give it as my opinion to your Lordships that, as the law stands at present, the power in question has been well executed.

The first of these is the case of *Wright v. Wakeford*. (c) A deed contained a power for trustees, by consent of *cestui que trusts*, testified by writing under their hands and seals, attested by two or more credible witnesses, to make sale of certain lands ; the *cestui que trusts* did sign, seal, and deliver a deed testifying their consent to a sale, in the presence of two witnesses, but the attestation was in terms of the sealing and delivery only. Upwards of twenty years afterwards the witnesses added a fresh attestation to the deed, by which they attested the signature also. The case was sent by the Lord Chancellor for the opinion of the Court of Common Pleas, and three of the Judges, Justice HEATH, Justice LAWRENCE, and Justice CHAMBRE, held that the power of sale was not

(a) Str. 1100.

(b) Willes, 1.

(c) 17 Ves. 454, and 4 Taunt. 213.

well executed, by reason of the omission of any mention of "signing" in the first attestation, and that the second was of no avail to cure the defect of the first. Lord Chief

* 350 Justice * MANSFIELD seems to have considered that the first attestation was sufficient, and that the witnesses must be understood to attest the signing, but that at all events the defect (if any) was cured by the second. The decision, therefore, was that of the three Judges I have named, who state the ground upon which they determined the question thus: "As a question of law, we think it must be determined by the true construction of the terms of the attestation, to which it appears to us that our consideration must be confined; and we do not think that the signature is comprehended in the words made use of in the attestation." The decision, therefore, turned expressly upon the special form of the attestation, by which the witnesses state in terms what they did attest, excluding thereby any presumption that they witnessed more than is expressly stated.

The effect of an attestation in general terms to a deed, which upon the face of it imports that all the requisites of a power have been pursued, was not, and indeed could not, properly be considered in the case of *Wright v. Wakeford*, which was decided upon a principle which does not apply to such a case; and I have been unable to find one in which it has been held that a general attestation is insufficient where upon the face of the instrument the requisites of the power appear to have been complied with. The case of *Doe v. Peach* (a) was determined expressly on the authority of *Wright v. Wakeford*, and upon facts nearly the same; the power requiring signing as well as sealing and delivering, and there being a special attestation of sealing and delivering only. The case of *Wright v. Barlow* (b) is to the same effect: the power required signing as well as sealing, and there was a special attestation of sealing and deliver-

* 351 ing only. * In *Moodie v. Reid*, (c) the power required the will to be signed and published by the testatrix in

(a) 2 M. & Sel. 576.

(b) 3 M. & Sel. 512.

(c) 1 Madd. 516; 7 Taunt. 355.

the presence of and attested by two or more witnesses. The attestation in that case was general, as in the present; the word "witness" only was used, as in this; but there was nothing on the face of the instrument itself to indicate that it had been published; the words "publish and declare" are not to be found in it, and nothing more appears upon the whole instrument than that it was signed. In the case of *Stanhope v. Keir*, (a) the power required the will to be signed and published in the presence of and attested by three or more witnesses. The attestation was general, but there was nothing on the face of the instrument to show that it had been published, though it had been signed. In *Buller v. Burtt*, (b) the power required the deed to be sealed and delivered in the presence of and attested by the witnesses. The attestation was general, but the instrument only purported to be signed and sealed, and made no mention of delivery. The cases of *Moodie v. Reid*, *Stanhope v. Keir*, and *Buller v. Burtt*, therefore are clearly distinguishable from the present, and within the principle of the other cases, as the witnesses must be taken to attest no more than they appear to have attested, either by reference to the attestation if special, or to the instrument itself if general. The case of *Ward v. Swift*, (c) which is one of the latest cases upon the subject, is not an authority either way: the power required that the will should be duly executed and published in the presence of witnesses, and the attestation was that it was signed, sealed, and delivered as the last will, which was held sufficient.

* Those are the leading authorities upon which it is * 352 contended that the power in the present case is not well executed, and that there ought to have been a special attestation. It appears to me that they are all distinguishable upon the grounds I have mentioned, and that they are not authorities to show that a general attestation to an instrument, which on the face of it shows that the formalities required by the power have been complied with, is not sufficient. I should observe here, that there is the direct author-

(a) 2 Sim. & Stu. 37.

(b) Cited in 4 Ad. & El. 15; 6 N. & M. 281, n.

(c) 1 Cr. & M. 171; 3 Tyrw. 122.

ity of Sir J. LEACH, in the case of *Buller v. Burtt*, that where the attestation is general, as in this case, the instrument which is attested may be referred to, to ascertain from it, if possible, what it was that the witnesses attested. It is said, however, that this could only be available on the presumption that the witnesses read the instrument. This does not appear to me to be the true ground, but that, as the witnesses must be presumed to have attended to witness something, and as their signature as witnesses shows that they did witness something, the deed may be referred to, to raise a presumption that that was done which on the face of it appears to have been done.

It may be said, however, that in the present case the terms of the instrument, if referred to, raise no such presumption, and that the words "I do publish and declare this to be my last will and testament" are not sufficient to raise the presumption that she did publish and declare it. The power requires that she should publish her will in the presence of three witnesses; there are three witnesses to the will, and she says that she does publish it; surely it is to be inferred that she did that which she says she did, and not that she merely wrote the words, without doing the act which was essential to the validity of the will.

* 353 * In conclusion, I may add that all or nearly all the learned Judges, who in the previous stages of this case have expressed an opinion contrary to that which I entertain, have founded their judgment on the case of *Wright v. Wakeford*, with some expression of regret that the case had been so decided; it may therefore be presumed that, but for that case and those founded upon it, they would have been of a contrary opinion. Upon the whole, it appears to me that those cases are entirely distinguishable from the present, and that the power is well executed.

MR. BARON ROLFE. — The question in this case is, whether the power of appointment given to Lydia, the wife of William Augustus Skynner, by her marriage settlement, was duly executed by her will. For the purpose of considering that question it is only necessary, so far as relates to the contents of

the will, to observe, that the testatrix declares in the body of the instrument that she publishes it as her last will ; secondly, that by it she disposes of all her real estate ; thirdly, that it purports to be signed and sealed by her ; and lastly, that at the foot of the will the names of three credible persons are written under the word " witness," but without any form of attestation. The will contains no reference to the power. The verdict finds, that in fact the will was signed, sealed, and published in the presence of the three persons who had so signed their names under the word " witness ;" so that the only point to be considered is whether, according to the terms of the power, it is necessary, not merely that the testatrix should sign, seal, and publish in the presence of three credible persons, who should sign their names as witnesses, but, further, that the fact of that having been done should be * expressed on the face of the attestation. If the * 354 case of *Wright v. Wakeford* (a) be a decision which ought to be considered as binding on this House, then it is clear that the will would not have been a valid execution of the power if, instead of the word " witness," there had been the words " sealed and published in the presence of ;" and the first point to be considered is, whether this variation in the form of the attestation, i. e., the use of the general word " witness," instead of the special words " sealed and published in the presence of," makes any real difference in principle. Whether the doctrine involved in the case of *Wright v. Wakeford* at all turns on the point of the attestation being special and not general, I am of opinion that it does not. The principle on which that case proceeded was, that the power, according to its true construction, required a form of attestation expressing that the parties executing the instrument had signed as well as sealed in the presence of the witnesses, that is, an attestation expressing a compliance with all the acts required by the power. This is stated by the majority of the Judges who certified, to have been the ground on which their certificate proceeded ; and because the attestation in that case expressed a compliance with one only of the req-

(a) 17 Ves. 454, and 4 Taunt. 218.

quisites of the power, namely, sealing, and was silent as to the other, namely, signing, therefore they held that the attestation did not on the face of it necessarily import a compliance with both requisites, and was therefore bad. Now, here there is no form of attestation at all; the witnesses merely sign their names under the word “witness;” and the argument by which the present case is attempted to be distinguished from *Wright v. Wakeford* is, that here there is no *expressio*

unius which may reasonably lead to the *exclusio*

* 355 * *alterius*, — that, as nothing is expressed, all may fairly be presumed. If the question were, what was in fact done at the time of the execution, whether the executing party really did sign, seal, and publish in the presence of those persons who have subscribed their names as witnesses, the distinction might perhaps be of great importance; but the question, when it is attempted to distinguish this case from *Wright v. Wakeford*, is not what in fact was done at the time of the execution, but what the attestation necessarily imports to have been done. Looking at the question in this point of view, it seems to me just as impossible to say of a general as of a special attestation, that it necessarily imports a compliance with all the terms of the power. I am, therefore, of opinion that the present case cannot be successfully distinguished from *Wright v. Wakeford*. If that be so, it remains to consider whether that case is or is not one which your Lordships ought to treat as binding on this House as the ultimate Court of appeal.

Now, the certificate in *Wright v. Wakeford* was given, it is to be observed, in Hilary term, 1812, being above thirty years before it has been called in question in this House, and above twenty years before the present ejectments were brought. It was a certificate of three most eminent Judges delivering an opinion, differing, it is true, from that of Sir JAMES MANSFIELD, but concurring, I think it must be considered, with that of Lord ELDON. It is true that we have no report of what was done by the Court of Chancery on the return of the certificate, and it must be admitted that the mere refusal to decree a specific performance in such case would certainly not of itself conclusively show Lord ELDON’s view of the

law; but it is difficult to read the report of his judgment, when he directed the opinion of the Court of King's * Bench to be taken, without believing that his mind * 856 then strongly leaned towards the view of the law afterwards adopted by Mr. Justice HEATH, Mr. Justice LAWRENCE, and Mr. Justice CHAMBERE; besides, Lord ELDON held the Great Seal for more than fifteen years after the certificate was given, and if he had not considered it as correctly laying down the law, it is difficult to believe that he would not, either during the progress through Parliament of the retrospective Act to which it gave rise, or on some occasion either in the Court of Chancery or in this House, have expressed his doubts on the subject; more especially considering the great respect and deference which Lord ELDON always expressed towards Sir JAMES MANSFIELD, whose opinion was opposed to that of the three Judges. With a judgment, then, proceeding from such Judges, and thus sanctioned, it is impossible not to feel the very strong probability that sales and purchases may have been made, and titles have been accepted and rejected, for a period now exceeding a quarter of a century, on the faith of the law being such as the case of *Wright v. Wakeford* stated it to be; and though such considerations are not necessarily binding, like an Act of Parliament, yet they have in doubtful cases, like the practice of conveyancers, been always treated as of great weight in ascertaining what the law is.

Now, with reference to the present question, there has been not only an acquiescence in the case of *Wright v. Wakeford*, and it must be presumed a practice among conveyancers conformable to it, for a period of more than thirty years; but there has been also a long string of cases recognizing it as settled law, following it where the facts have been the same, and distinguishing it where they have been different.

The first case which occurred on this point after the * decision of *Wright v. Wakefield*, was *Doe v. Peach*. (a) * 357 There the terms of the power and the form of the attestation were substantially the same as in *Wright v. Wakeford*.

(a) 2 M. & Sel. 576.

The Court of King's Bench took time to consider their judgment, expressly with the view of deciding between the conflicting opinions of the Chief Justice and the other Judges of the Court of Common Pleas; and after deliberation, Lord ELLENBOROUGH, in pronouncing the judgment of the Court of King's Bench, expressed his concurrence with the doctrine laid down in the certificate of the three Judges, and stated the true principle to be that the attestation must be coextensive with the things required to be done. This decision was in Easter term, 1814; and when the same question was again attempted to be argued in the case of *Wright v. Barlow* (a) in Hilary term, 1815, and in *Doe v. Pearce* (b) in Michaelmas term, 1815, Lord ELLENBOROUGH (in the former) and Chief Justice GIBBS (in the latter) said they considered the question as settled by the preceding decisions.

Two years afterwards the same question arose in the case of *Moodie v. Reid*, (c) which was a case from Chancery. The power there was to appoint by any will signed and published in the presence of and attested by two or more credible witnesses; the will was attested by two witnesses; in the *testimonium* clause the testatrix says that "these bequests are signed by me," but there was no clause of attestation, except the word "witness" preceding the names of the witnesses. Chief Justice GIBBS stated (whether quite accurately is not now the question) that this was clearly a good attestation of the signing, but added, that the question was, whether by attesting the signing the witnesses also attested the

* 358 publication. Now, it * appeared clearly in that case that the testatrix in fact signed the will in the presence of the two witnesses, and at the time of doing so made use of expressions indicating that the instrument was her will. This, I conceive, was clearly a publication; and the doubt, therefore, must have been, not whether the will was in fact published but whether the attestation sufficiently expressed that it had been published in the presence of the witnesses. The Court, after taking time to consider, certified against the validity of the execution, on the ground, mani-

(a) 3 M. & Sel. 512.

(b) 6 Taunt. 402.

(c) 1 Madd. 516; 7 Taunt. 355.

festly, of the insufficiency of the attestation, adopting to its full extent the principle of the previous cases.

The next reported case in which this principle was acted on was *Stanhope v. Keir*, (a) where Sir J. LEACH held that a power to appoint by a will signed and published in the presence of and attested by two credible witnesses, was ill executed by a will in which the attestation did not extend to the publication; and in *Buller v. Burtt*, (b) the same learned Judge held, on the same ground, that where the power was to appoint by a deed signed, sealed, and delivered in the presence of and attested by two witnesses, the appointment was bad by reason of the attestation not extending to delivery. It is true, that in that case his Honor is reported to have held, that where the form of attestation is general the witnesses must be taken to attest all which is stated in the body of the deed to be done in their presence; and, consequently, that if in the body of the deed the instrument had been stated to have been delivered, as well as signed and sealed, in the presence of the witnesses, he should have held the power well executed. That opinion, however, was not necessary in order to support the judgment; it was, therefore, extra-judicial, and, as I humbly * conceive, * 359 altogether erroneous, assuming, as it does, contrary to every day's experience, that the contents of the deeds are known to the witnesses. In the case of *Hougham v. Sandys*, (c) a question arose as to the application of the retrospective Act (54 Geo. 3, c. 168) in that particular case. The facts there are not applicable to the present, but the case is so far important as affording an additional recognition of the general doctrine. These cases were followed by several others in which the question arose, whether, when the power required a will signed and published in the presence of and attested by three witnesses, the attestation was good, expressing the will to have been signed and delivered in the presence of and attested by the three witnesses; — whether, in short, delivery under such circumstances was not the same

(a) 2 Sim. & Stu. 37.

(b) Cited in 4 Ad. & El. 15; 6 N. & M. 281.

(c) 2 Sim. 95.

thing as publication. His Honor the Vice-Chancellor, in *Simeon v. Simeon* (a) and in *Lempriere v. Valpy*, (b) held that it was; and the same thing was decided by the Court of Exchequer in *Ward v. Swift*, (c) and *Curteis v. Kenrick*. (d) These decisions evidently left the general question untouched. The principle is not that the words of the attestation must be the same as those of the power, but that they must necessarily import a compliance with all the requisites of the power; and when once it was decided, as a matter of construction, that delivery means the same thing as publication, the consequence necessarily followed that the powers in those cases were well executed. In the more recent case of *Mackinley v. Sison*, (e) his Honor the Vice-Chancellor decided in favour of the appointment, on similar grounds. Whether it is quite clear that the words of attestation there used

* 360 did * necessarily import publication may, perhaps, admit of doubt, but it is sufficient that such was the ground on which the judgment rested. The only remaining case is that of *Waterman v. Smith*, (g) decided by the Vice-Chancellor so lately as the year 1840. There the only question was as to the validity of an appointment made under circumstances exactly the same as those which existed in *Wright v. Wakeford*. His Honor treated that case as established law, and would not hear the counsel who were to have argued in support of it. The property in question in that case was administered on the assumption of the law being such as was laid down in *Wright v. Wakeford*, and there can be no doubt but that in other unreported cases the same principle has been acted on. Such being the uniform current of the authorities during a period of more than thirty years, and the rule itself being one which results naturally from the language of the power, is easily intelligible, and well calculated to secure accuracy in carrying out the intentions of those by whom powers are given, I see no reason to think that it was not well laid down at first, and still less to think

(a) 4 Sim. 558.

(b) 5 Sim. 108.

(c) 3 Tyrw. 122; 1 Cr. & M. 171.

(d) 3 M. & W. 461.

(e) 8 Sim. 581.

(g) 9 Sim. 629.

that it ought now to be departed from ; and I beg leave, therefore, in answer to your Lordships' question, to say that in my opinion the power in question was not duly executed.

MR. JUSTICE MAULE. — My Lords, I am of opinion that the power was well executed. All that is required to make a good execution by will is, that the will should be in writing, signed, sealed, and published in the presence of and attested by three credible witnesses. The jury have found that the will was signed, sealed, and published in the presence of three * persons whom it names, and that it was attested * 361 by them in the manner which appears in the instrument, which is by writing their names under the word “ witnesses.” The will on the face of it professes to be signed, sealed, and published. Considering this, even independently of authority, I could feel no doubt that the will was a good execution of the power, inasmuch as it is signed, sealed, and published in the presence of, and attested by three witnesses, which are all the conditions imposed by the instrument conferring the power ; for I cannot doubt that the substantive to which the participle “ attested ” is to be referred, is the will, which is mentioned ; not signature, execution, &c., which are not mentioned. If that be otherwise, it will be necessary, when a party creating a power means that the will shall be attested, to state that the power must be executed by will signed, by will sealed, by will published, and by will attested. It is, then, as much violence to language to consider signature, &c., to be the substantive to which “ attested ” is to be applied, as it would be to consider signature to be that to which seal is to be applied ; and it requires that the signature should be sealed, in order to a good execution.

With regard to the decisions in which executions have been held defective ; there is no case that has decided that a will purporting on the face of it to be duly executed and attested generally, is a bad execution of such a power as this ; and therefore none requiring this execution to be so held. The use of such restrictions as these in this power is to secure due deliberation and solemnity in the execution : that of requiring attesting witnesses is further to have certain known

persons, who may be called when the execution of the deed shall be to be proved. All these advantages are secured
 * 362 by such an execution as the * present. A rule requiring any thing further is merely arbitrary, and ought not to be extended.

MR. JUSTICE ERSKINE. — My Lords, in answer to your Lordships' question, I have to state my opinion that the power given to the testatrix was duly and effectually executed by her will. By the deed of settlement conferring the power it was required that the appointment should be by will, to be by her signed, sealed, and published in the presence of and attested by three or more credible witnesses. The special verdict expressly finds that the will in question was signed, sealed, and published by the testatrix in the presence of three witnesses, and attested by them ; and the only question raised in the argument was, whether the attestation which is set out in the special verdict was sufficient. The attestation in form is by the witnesses affixing their signatures to the word " witness," under the signature and seal of the testatrix ; and the objection to this form of attestation is, that it does not specify of what the persons signing were witnesses, whereas it is said that by the decided cases it had been held that it should appear upon the face of the memorandum of attestation that the will had been executed with all the formalities required by the settlement conferring the power.

Before I proceed to examine the several authorities cited in support of this position, I would remind your Lordships that, although in the case of a common bond or deed the execution must be by sealing and delivering the instrument, and although in most instances the attesting witnesses sign their names under a memorandum that the deed was sealed and delivered in their presence, yet, in point of law, a person who has signed his name to the word " witness " is considered as much the attesting witness to the instrument

* 363 * as if he had signed the more formal attestation. So also, although by the Statute of Frauds the legislature required that all devises of lands should be attested and subscribed, in the presence of the devisor, by three or more

credible witnesses, it has always been held that a devise of land was well attested by the witnesses subscribing their names to the word "witness," as in the case now under discussion. From this, it is clear that in general the execution of an instrument may be well attested, although the memorandum of attestation does not specify the acts that were necessary to make the execution effectual and perfect. In what respect then did a devise of land, made before the late statute of her present Majesty (1 Vict. c. 26), in execution of a power, vary from any other devise of land? In this respect only, that its execution must have been attended with all the formalities prescribed by the donor of the power, as well as with those prescribed by the Statute of Frauds; and therefore if the donor of the power had required that the memorandum of attestation should be in a specific form, a general attestation like that under discussion would have been insufficient. But the donor of the power has not in this case prescribed any particular form of attestation, and therefore when he uses the term "attested," he must, I think, be taken to use it in its ordinary sense; and we have seen that when taken in its ordinary sense, both as applicable to deeds and wills, under the Statute of Frauds, the term is fully satisfied by the witnesses affixing their signature to the word "witness." Why, then, should it be necessary that in a will made in execution of a power the memorandum of attestation should state the particulars of the execution? The object of the attestation is in both cases the same; namely, that the * persons whose interests may be affected by the * 364 will should have the means of knowing who the parties present were, and of ascertaining, through them, whether the requirements of the statute in the one instance, and of the power in the other, had been duly complied with; and this purpose is as well answered by a general as by a particular attestation. And that no sufficient reason exists for requiring in such cases a special memorandum of attestation may be now affirmed without presumption, since the legislature has thought it right to declare that no form of attestation shall for the future be necessary to render valid an appointment by will, even though the donor of the power may have ex-

pressly required it. As the donor of the power, therefore, in this case has not required any special attestation, and as all that he has required is found to have been performed, I can find no legal principle on which your Lordships should be called upon to declare the power not well executed.

But it has been argued, that it is too late now to inquire into the propriety of requiring a special memorandum of attestation to a will made in execution of a power before the Statute 1 Vict. c. 26, because a long series of decisions has established the rule that the memorandum of attestation to such a will must expressly specify that the execution was attended with all the formalities required by the instrument conferring the power. It will be necessary, therefore, to examine the cases somewhat in detail, that your Lordships may see to what extent the House, by affirming the judgment of the Court of King's Bench in the present case, will in effect overrule the decisions in former cases.

In the case of *Wright v. Wakeford*, (a) the memorandum * 365 of attestation only stated that the deeds had been sealed and delivered by the *cestui que trusts*, and omitted to state that they had been also signed by them. Upon a case sent by Lord ELDON to the Court of Common Pleas, the three puisne Judges of that Court held, in opposition to the opinion of Lord C. J. MANSFIELD, that the power of sale was not duly and effectually executed by the indenture so attested; and in their certificate they assume, as the foundation of their judgment, that the witnesses must be considered as attesting only those formalities that were specified in the memorandum of attestation, and that as the signature of the *cestui que trusts* was not comprehended in the words made use of in the attestation, the execution of the power was incomplete.

Now the decision might be supported upon one of two grounds, — either that it was necessary that the memorandum of attestation should in terms expressly specify the several formalities which the witnesses professed to attest, or that, as the memorandum of attestation in that case expressly

(a) 17 Ves. 454; 4 Taunt. 213.

stated that the deeds were sealed and delivered in the presence of witnesses, their signatures would be taken as attesting those facts, and those only. If the case was decided upon the first of these grounds, it would be a direct authority against the plaintiffs in error in the case before the House; if upon the latter, it would leave untouched the question as to the sufficiency of a general attestation like the present. The certificate does not clearly point out upon which of these grounds the learned Judges who signed it rested their judgment; and as the decision might, in my opinion, be well supported upon the latter ground, although inconsistent with some of the cases under the Statute of Frauds, I should not have considered it as an * authority conclusive on * 366 the present inquiry, especially as I do not find that any case was cited, either at the bar or from the bench, that would support the former proposition. But the difficulties with which the plaintiffs in error have to contend arise not so much upon the case of *Wright v. Wakeford*, as reported, as upon the interpretation put upon that decision in later cases.

In *Doe v. Peach*, (a) the Court of King's Bench adopted the decision of *Wright v. Wakeford*, and the reasons given in the certificate of the three puisne Judges; but, in delivering the judgment of the Court, Lord ELLENBOROUGH makes use of this expression: "But it seems to us that to make a due execution of the power there must be a making of an instrument, with all the forms required by the power, and that there must be an attestation of its execution with all those forms. The intention of the parties was that the attestation should be coextensive with the things required to be done, and this makes the case directly the same as *Wright v. Wakeford*." But although it may be collected from this passage, that it was the opinion of the Court of King's Bench that the witnesses could only be considered as attesting the circumstances specified in the memorandum of attestation, yet as in that case the memorandum specified two of the requisites, and omitted the third, the decision of the case does not

(a) 2 M. & Sel. 576.

necessarily exclude the sufficiency of a general form of attestation like that now under consideration.

The question in *Wright v. Barlow* (a) was precisely the same as that in *Doe v. Peach*, and was decided by the Court of King's Bench upon the authority of that case, still

* 367 referring to *Wright v. Wakeford* as the * foundation of both ; and there are no expressions used by the Court indicating any opinion as to the insufficiency of a general form of attestation.

The question, therefore, remained as *Doe v. Peach* had left it. In the case of *Doe v. Pearce*, (b) the deed creating the power required the instrument to be under hand and seal, and attested by two or more credible witnesses. The will in execution of the power was signed and sealed, but the attestation was of the signing only. The question, therefore, in this, though differing in form, was in principle the same as that raised in the three former cases, and was decided upon the authority of *Wright v. Wakeford*.

In the case of *Ward v. Swift*, (c) the question was, whether a memorandum of attestation, stating that the will in question had been "signed, sealed, and delivered as the last will and testament of Mary Swift, who, in her presence, and in the presence of each other, have put our names as witnesses thereof," was a sufficient attestation of the signing, sealing, and publication of the will by Mary Swift in the presence of the witnesses. The Court of Exchequer held the attestation sufficient ; and I find nothing in the case to affect the question now before your Lordships, except this question put by Mr. Baron BAYLEY to the counsel : "Must not your attestation reach all that the witnesses are required by the instrument creating the power to attest ?" But as there was in that case a special attestation, the question became the same as that in *Wright v. Wakeford*, whether the attestation included all the formalities required by the power ; and the only difficulty was that suggested by Lord LYNTHURST at the close of the

* 368 argument, * whether the attestation imported that the

(a) 3 M. & Sel. 512.

(b) 6 Taunt. 402.

(c) 3 Tyrw. 122 ; 1 Cr. & M. 171.

will was signed, sealed, and delivered in the presence of the witnesses: but the decision of the case shows that that difficulty was removed. None of these cases, therefore, appear to me to be direct authorities for the position that a general attestation, as in the present case, is insufficient.

There are other cases, however, in which the form of attestation was general, and which require particular consideration; namely, *Moodie v. Reid*, *Stanhope v. Keir*, and *Buller v. Burt*. (a) In *Moodie v. Reid* the attestation was, as in this case, by the signature of the witnesses under the word "witness;" but then the case sent to the Court of Common Pleas from the Court of Chancery involved the question of the due execution of the will by the testatrix, as well as the sufficiency of its attestation by the witnesses; and the certificate sent to the Court of Chancery did not specify on which of the two grounds the Court finally held that the power had not been well executed. And although Lord Chief Justice GIBBS, at the close of the argument, observed that the case of *Wright v. Wakeford* established that the witnesses must attest every thing that is necessary for the execution of the power, and did not express any disapprobation of that decision, yet by his remark that the witnesses had clearly attested the signing, it is plain that at that time he did not consider that the case of *Wright and Wakeford* had established that in no case could the signatures of the witnesses be taken as an attestation of any formality not expressly specified in the memorandum of attestation, for the signing was not so specified in that case; and it does not appear from * the report, upon what grounds the * 369 decision ultimately rested.

In the case of *Stanhope v. Keir*, the power was to be executed by will, signed and published by the donee of the power, in the presence of and attested by three or more credible witnesses. The will concluded with the words, "and this is my last will and testament, made and signed in the year of our Lord 1818," &c., to which were subjoined the signature and seal of the testatrix; and under those

(a) See the references to these cases, *supra*, 344.

were written the words "in the presence of," and then followed the signatures of the three witnesses. In that case there was no question whether the will had in fact been duly signed and published by the testatrix in the presence of the witnesses. The question turned upon the sufficiency of the attestation; and it was argued in support of the will, that the declaration with which the will concluded was in effect a publication as well as a signing, and that the witnesses, by adding their names to this declaration, attested both facts. The Vice-Chancellor, Sir J. LEACH, said that the argument for the defendant supposed the witnesses to be acquainted with the contents of the will, but that he could not assume more from that attestation than that they saw Mrs. Keir sign the instrument. But here again the signing was not mentioned in the memorandum of attestation, and Sir J. LEACH therefore could not have thought that compliance with the formalities required must be expressly certified by the memorandum of attestation. It must, however, be admitted, that by overruling the plea of the defendant, Sir J. LEACH must be understood to have decided that by the adoption of this general form of attestation the witnesses could not be considered as attesting all that really took place at the

* 370 execution, and that the * Court could not refer the term "witness" to the allegation in the will; and this case, therefore, is an authority against the opinion which I have formed.

The case of *Buller v. Burt* was also decided by Sir J. LEACH when Master of the Rolls. There the execution of the power was to be by deed, sealed and delivered in the presence of and attested by two or more credible witnesses. The defendant Burt claimed under a deed which was found amongst the papers of his father, who was one of the witnesses to the deed. This instrument concluded with the words "signed and sealed at Cotton aforesaid," &c., and then followed the signature and seal of the donee of the power, under which was written the word "witness," and opposite to it were the signatures of two witnesses. The plaintiffs by their bill allege that the instrument had never been delivered, and that even if it had been delivered, it was not a due execution

of the power. The defendant swore that he believed it had been delivered to his father, amongst whose papers it was found. But there does not appear to have been any evidence, beyond the inference to be drawn from the attestation itself, that the deed had in fact been sealed and delivered in the presence of two witnesses, as required by the settlement conferring the power. From the report of this case, Sir J. LEACH appears to have assumed, contrary to his former opinion in *Stanhope v. Keir*, that the Court might look to the will itself for the purpose of ascertaining what facts had been attested by the witnesses when they affixed their signature to the word "witness;" and then to have decided, that as there was no allegation on the face of the deed that it had been delivered, the witnesses could not be considered as attesting that fact to have taken place in their presence. The decision of Sir J. LEACH * seems to have proceeded on * 371 the ground that, assuming that all had taken place that the deed itself recites, and that the attestation was evidence of all the facts recited, still that there was no evidence of the deed having been delivered in the presence of the witnesses, and consequently no attestation of that fact. And if this may be taken as the real ground of the decision, the case supports the view taken by the Court of King's Bench, and adopted by other learned Judges in the Court of Error, in the cases now under consideration; namely, that such a general form of attestation may be taken as referring to the allegations in the latter part of the will itself, and in effect to attest all that appears upon the face of the will to have been done, and would not interfere with another suggestion, which I submit to your Lordships' consideration; namely, that a general attestation like the present in effect attests the execution as it actually took place; and that as the special verdict finds that all the required formalities were in fact complied with, the witnesses must be held to have attested that those formalities took place in their presence.

The case of *Stanhope v. Keir* appears to me to be the only authority directly opposed to either of these grounds for concluding that the will was in this case well attested; and therefore, as the word "witness" must be taken to refer

either to the facts that really took place, or to the acts recited in the latter part of the will, and as it appears, both from the facts found by the special verdict, and by the statements in the will that precede the signature of the testatrix, that all that was required by the donor of the power was actually done, I think the attestation was sufficient, and I answer your Lordships' question in the affirmative.

* 372 * MR. JUSTICE COLTMAN. — My Lords, in answer to the question proposed by your Lordships, I humbly beg to state my opinion that the power given to the testatrix by the settlement set forth in the special verdict was not duly and effectually executed by her will, as stated in the said verdict. The grounds on which I have come to this conclusion have been stated by me, in a former stage of this cause, in detail, and as, on mature reflection, I have found nothing to alter in that judgment, or to add to the reasons which I then urged, it would be a useless occupation of your Lordships' time to reurge them; and therefore I humbly crave leave to refer to the printed report of them, as containing all that I can usefully suggest on the subject. (See 9 Ad. & El. 940.)

MR. JUSTICE COLERIDGE. — My Lords, in the settlement to which your Lordships' question refers, the power given to Lydia Henning Ward is to be executed "by her last will and testament in writing, or any writing purporting to be, or in the nature of, her last will and testament, or by any codicil or codicils thereto, to be by her signed, sealed, and published in the presence of and attested by three or more credible witnesses." This power requires acts to be done by the donee and by the witnesses; she is to sign, seal, and publish in the presence of the witnesses; they are to attest the act so done by her in their presence. No question is now made but that she on her part has done all that she was required to do: the question is, whether they have done what was necessary on their parts; and as that is comprised in the single word "attested," without specifying any particular form, the only inquiry will be, what is the proper meaning of that

word? It will be convenient, however, to *place *373 before the House, as we proceed, what has been really done by the donee and the witnesses. She has made a will, in the last sentence of which she says: "I declare this only to be my last will and testament: in witness whereof I have to this my last will and testament, contained in one sheet, set my hand and seal the 12th day of September, in the year of our Lord 1789." She has signed her name once between the month and the year, and once after the latter; she has also sealed it. The word "witness" then appears, and under it the three witnesses have signed their names.

To attest, in common language, means either to call to witness, or to witness. The former sense, in the present case, is out of the question. Any one reading the sentence in this power, who was not conversant with legal decisions, would understand it to imply that the execution was to take place in the presence of three credible witnesses, who were not to be merely present, but present as witnesses, and taking cognizance of what was done; the words being, "in the presence of and attested by;" and looking on the will he would announce that there appeared to have been a valid execution of the power, for he would see that they had written their names as having witnessed the transaction. If such a person had been shown the 5th section of the Statute of Frauds, the written law, which makes a provision in a matter of all others the most analogous to the present, — the execution, namely, of ordinary wills in writing, which are in truth but instruments framed in the exercise of statutory power, — he would not only be confirmed in his conclusion, but be led to think that the witnesses, by writing their names, had perhaps done something more than was strictly necessary; for he would have *found that where signing by the witness, *374 as well as merely witnessing, was required, the legislature, in language cautiously and technically framed, had said that they should not only attest but subscribe the instrument. He could not doubt that those who framed that clause had considered attestation and subscription to be different things, the latter being something superadded to the former. He would be still further confirmed in his first opinion if he were

told, that although the same section prescribed certain conditions as necessarily attaching to the attestation and subscription of the witnesses, yet the Courts of Law had held it unnecessary that a compliance with those conditions should be stated by the witnesses on the face of their attestation or subscription. From all which, he would necessarily infer that in common parlance, in the language of the statute law, and by the construction of Judges, such conditions formed no part of, were not implied in, the term "attestation" or "subscription," or both together. Further, if the power, the will, and the attestation now before me, were laid before any jurist skilled in the principles of legal construction, but unacquainted with the decisions of our Courts, I am persuaded that, trying the question upon those principles, he would be satisfied that all had been done that was required, all that the framer of the power had required by way of security for the due, considerate, and solemn exercise of it by the donee.

It will not be supposed that I think I am disposing of the question propounded by your Lordships by this mode of illustrating it; but I venture to think that the considerations which are suggested by this illustration, if it be true in fact,

ought not to be without their weight in examining
 * 375 what remains of the question; * namely, the course of decisions in our Courts, which are said to militate against the foregoing conclusions. It is something, surely, if those decisions should be found not agreeable to the conclusions of mere common-sense, statutory interpretation, judicial construction by our Courts, and the reasonings of jurists on general principle. It is something, but, I admit, far from all; for if the decisions of our Courts shall have proceeded in a uniform course, although that course may be ever so unsatisfactory, yet we in Westminster Hall are bound by them, however your Lordships may be unfettered; and it has been the wisdom of your Lordships also to regulate your own freedom of decision, on the principle that the greatest of evils in the administration of the law is uncertainty and inconsistency.

It is not inconsistent, however, with this principle, that we should deal with decisions which we think wise and just, in a

different spirit from that in which we treat those which we think mistaken and unjust. In applying the former, we regard the principle involved, even more than the mere circumstances, and consider them authority beyond the letter for every case ranging within the principle. In the latter there is a natural conflict of the mind, in every instance of acting on their authority, between a sense of the necessity of so doing on general principles, and of the particular hardship and injustice which we work in the application: it is, therefore, a well-known rule, familiar in use, that such decisions are authority only when the very same circumstances arise again. If ever there were decisions to which this rule was applicable, I conceive these to be such. My learned brothers who formed the majority in the Court of error below unite in regretting that they have been made; they *introduce uncertainty and inconsistency into a * 376 branch of our law wherein, beyond any other, certainty and consistency are desirable, to an extent which, until examined, we are hardly aware of. Sir EDWARD SUGDEN puts the case of a power framed, as to the attestation, in the exact words of the fifth section of the Statute of Frauds; and according to these decisions, a will under the statute, and one under such a power, attested in exactly the same words, would be held the one good, and the other invalid. These decisions have been twice condemned by the legislature; first by the 54th Geo. 3, c. 168, and more decidedly and effectually by the 1st Vic. c. 26, § 10, which, in imitation of the New York Revised Statutes, enacts, that all appointments by will, in exercise of any power, shall be executed in the manner therein before required as to other wills, that is, without any form of attestation; and that every will so executed shall, so far as requires the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

These decisions have undoubtedly raised a general impression in the profession, that, in order to exercise a power securely, the attestation clause should state in terms the per-

formance of all solemnities prescribed with regard to the execution of the instrument. I do not propose to examine the whole series in detail; it has already been done in the learned arguments of the Judges in the Court below in this case, and at the bar of the House, and your Lordships are perfectly familiar with them. The cases of *Wright v. Wakeford*, (a) however, and of *Doe v. Peach*, (b) may be * 377 said * to be the foundation of the whole; it will therefore be worth while to see exactly what they decided. In the former the deed was required to be "under hand and seal, attested by two or more credible witnesses." The attestation indorsed on the deed was, "sealed and delivered by the within named — in the presence of — —." The majority of the Court certified that the word "sealed" did not necessarily imply that the party sealing had also signed in the presence of the witnesses; that signature was not comprehended in the words made use of in the attestation. *Doe v. Peach* cannot be distinguished from the preceding; and Lord ELLENBOROUGH said, "If the question be, whether it follows as a legal consequence, that an attestation of the sealing and delivery of a deed, is an attestation of the signing, we are bound to answer that it does not." Place by the side of these propositions that for which the defendants in error now contend, and see whether this foundation is at all coextensive with the superstructure. A power requires that a deed, in exercise of it, shall be under hand and seal, attested by two witnesses; the witnesses in the attestation clause, say that they saw it sealed and delivered; the Court concludes that these words do not import they saw it signed. Whether from that conclusion, which in itself was unobjectionable, they ought to have inferred a bad execution of the power, is not at this moment the question, but the conclusion itself was merely one of verbal construction. The proposition now contended for, as necessarily flowing from this, — so necessarily that it binds us against our sense of propriety and justice, — is this, that an attestation clause must in terms express every formality prescribed in the execution by the

(a) 17 Ves. 454; 4 Taunt. 213.

(b) 2 M. & Sel. 576.

power. This last may be a conclusion to be worked out from * the former; it may be said that attestation * 378 means attestation clause; and attestation of certain things, means an attestation clause stating in terms expressly their performance: all this may be very reasonable inference, but it has not been inferred in those cases by the Judges who decided them. It is not a necessary inference, nor can I find that in any one of the decisions cited in the various arguments of this case the Court has ever in terms drawn this inference.

It cannot, I am sure, escape your Lordships that the answer to your present question turns upon a consideration which does not appear to have been presented to the minds of those very learned Judges. There must be an attestation of all the formalities required: this I can afford to grant. The performance of the formalities must appear from the attestation clause: I can afford to grant this also. If the clause in terms states the performance of one or more, and is silent as to others, the analogy of legal reasoning will infer the non-performance of those others in the presence of the witnesses; it is as much as if they had said, "We can only say we saw the deed sealed and delivered, and as to the signing we can say nothing; we did not see it done." This, too, I can afford to concede. But what is the meaning of a general attestation clause that condescends upon no particulars? Whether, if by the last words of the instrument the party professes to perform all the particulars required for a due execution, the witness, by such general attestation, does or does not import an attesting of them all? These are questions wholly distinct from the former, and which the two cases above cited leave wholly undecided.

One of the earliest comments on *Wright v. Wakeford* and *Doe v. Peach* was that of the Vice-Chancellor * Sir T. PLUMER and Lord Chief Justice GIBBS, in the * 379 case of *Moodie v. Reid*; (a) both of them authorities much to be respected, and especially on such a point as this. There the will was to be "signed and published;" the testatrix

(a) 1 Madd. 528; 7 Taunt. 361.

at the close of her will said merely, "signed by me, this," &c. ; the attestation clause was only, "witness B. H., J. H." Sir T. PLUMER thought that *Wright v. Wakeford* did not rule this case ; he put that decision on its true ground, the expression of some being the exclusion of others. He said the question raised was new, and sent it for the opinion of a Court of Law. And how did the Court of Law deal with it ? They certified, indeed, that the power was not well executed ; but why ? Because the signing and publication were not attested ? By no means ; and yet neither were stated : the Lord Chief Justice expressly said, "The witnesses have clearly attested the signing ; the question is, whether they have attested the other formality of publication, in attesting the signing." The principle of the decision, then, was the same as in *Wright v. Wakeford*. Your attestation is to one only, out of two requisites ; you exclude thereby the other. But how was it an attestation to that one ? Not by its expression of it in terms, but only because, being entirely general, it was to be referred to that act which was stated in the close of the will by the testatrix herself. If in that part of the will she had said "signed and published" instead of "signed" only, must not Lord Chief Justice GIBBS have held that the witnesses had attested both, and that the power was well executed ? I see no escape from this conclusion ; and that is this very case. It is clear, then, that he did not draw the inference from *Wright v. Wakeford* which is now

* 380 pressed on * us, and his high authority is in my favour.

But was he warranted in holding that opinion ? A power requires certain things to be done, and attested by witnesses ; the donee in terms states that she has performed them ; and, so far as they can be shown on the face of the instrument, they appear to have been performed : immediately under is the word "witness," and the witnesses sign their names. It cannot be denied that they state themselves to be witnesses ; but witnesses of what ? Will you say, of nothing ? Is not that unreasonable, unauthorized ? Is it not, at least, to construe an ambiguous act so as to invalidate an instrument, when legal principle enjoins you to construe such so as to make it valid ? If you admit that they witness something,

why one act more than another? why not all? I agree that powers are to be strictly performed; but the reasoning by which we are to determine the question of a disputed performance, is to be the same in kind as that by which we determine any other disputed question of fact or construction in law.

It will be said that where the instrument must be, and on the face of it professes to have been, executed with several specified formalities, and the attestation is general, it is left uncertain whether the witnesses attested all, and, if not all, which of those formalities; and therefore is defective. I think, if sifted a little, this argument will be found based on premises which have no place properly in the discussion. If you read what is called the *testimonium* clause with the attestation, there is no uncertainty; then the conclusion is clear, that the latter imports a presence at and a witnessing of the whole. But it is said, you cannot do this, because witnesses commonly do not see or do not regard what is stated in the *testimonium* clause. I deny that you can enter into that consideration. If *you could, how far might it *381 not go? Witnesses very commonly do not even read the attestation clause; are we to inquire in each particular case whether they have done so? In truth, determining this as a question of law, we are to consider, not what witnesses do, but what they ought to do; when the creator of a power requires that witnesses shall attest certain acts as a security for their performance, we must assume him to proceed on the footing that the witnesses will discharge their duty properly; otherwise the whole provision is futile. Then what is the duty of a witness? Not to sign his name to he knows not what; he must be aware that he is called to see something done, and to affirm by his signature that he has seen it. Surely, then, he is to ascertain what it is that he is required to see and to affirm; if so, it seems to me a most reasonable presumption that where the attestation is general, and in terms excludes nothing, it makes no selection by inference, but affirmatively includes every thing stated in the *testimonium* clause; there is then no uncertainty. In *Stanhope v.*

Keir (a) and *Buller v. Burt (b)* Sir J. LEACH appears to have entertained the same opinion.

The extreme length to which I have already gone forbids me to examine the authorities further in detail; and it is unnecessary, because it is admitted that none can be found which exactly meet the facts of the present case. That would be enough for my argument; but, unless I deceive myself, I have gone further, and shown that a conclusion against the execution of the power in the present case is not only not a necessary, but not even a highly probable one, from the cases on which it is admitted that the course of decisions rests, or from the general body of those deci-

* 382 sions. I * may observe, in conclusion, that with regard to wills, no uncertainty for the future can arise from adopting the conclusion to which I come; as in respect of powers at present unimpeached for supposed defects in the attestation, this decision will operate to secure the title and possession of the grantees; and as to all wills executed under powers since the 1st of January, 1843, the statute passed in the first year of her Majesty's reign makes the provision before stated which puts an end to all these questions. I beg to state, therefore, in answer to your Lordships' question, that, in my opinion, the power in question has been well executed.

MR. JUSTICE WILLIAMS. — My Lords, I believe that all my learned brothers who have delivered their opinions against the decision of the Court of Queen's Bench, did so with an expression of regret; they came to the conclusion that the execution of the power in this case was invalid with reluctance, but felt themselves borne down by the overwhelming weight of authority. From the course of reasoning adopted by them all, I am warranted in inferring that if they had considered it still an open question they would have arrived at a different conclusion. It becomes a matter, therefore, of much importance to consider (before we consider their application to the

(a) 2 Sim. & Stu. 87.

(b) Cited in 4 Ad. & El. 15.

present case) what is the nature of those decisions to which so much weight is attributed; whether they establish any important principle connected with the observance of the intent and meaning of the creator of a power; whether they introduce any additional checks and securities; whether, in short, they are productive of any practical result more or less, or are of a character purely formal and technical; because I presume it will not be denied but that a more ample and liberal compliance and adoption are to be expected in the * former case than in the latter; in the latter they * 383 need only be pursued in cases precisely resembling them, more especially if they should chance to be in direct opposition to a great body of authority upon a kindred but much more important branch of the law.

Before I pursue this view of the subject further, I must beg leave to premise that the requisites of the power have, in my opinion, been complied with in point of form, as in substance they unquestionably have; upon this the special verdict has left no doubt; the will was executed in every respect according to the power. But I was adverting to the nature of these decisions. What is the difference as to any substantial effect between an attestation containing all the forms which my learned brothers require, and find wanting, as they think; and that which has been pursued here? To try this question, it is only necessary to suppose that the validity of the will is disputed; the self-same quantity of proof is required, whether the word "witness" stands by itself, or whether there be added "signed, sealed, read, published, and declared," or whatever else the dull ingenuity and unmeaning exaggeration of an attorney's clerk (for the witnesses themselves have no more to do with it than with the body of the will) may choose to accumulate into the clause of attestation. In each case the proof must be given or the will fails; the indorsement supplies nothing, profits nothing. The substance, therefore, of the transaction is, that the witnesses should see and be able to prove that the requisites have been complied with; the form is, that it should be written by somebody else that they did so. Except, therefore, the present case precisely resem-

bles those to which I am alluding, I see no reason for extending their authority.

* 384 * The question, however, undoubtedly is, whether the forms required by the power have been pursued by the testatrix, and whether those who are described as such appear to have been witnesses that she so pursued them; which I presume is the meaning of attestation, or I know not what it is. Now, the language of the power is, "by her last will and testament, to be by her signed, sealed, and published in the presence of and attested by three or more credible witnesses." All this has been done; and we are now to see whether, by ordinary and fair construction, neither forcing any interpretation in favour of it, nor wilfully excluding any reasonable inference for the mere purpose of defeating what we know to have been rightly done, the requisites appear to have been complied with; and here it seems to me very important to attend particularly to the document itself. The will, first, contains the whole testamentary part; every disposition of her property is first fully made, and the will is, therefore, as to that, its principal object, complete. The rest regards the manner and form of execution; it is thus: "I declare this only to be my last will and testament. In witness whereof I have to this my last will and testament, contained in one sheet, set my hand and seal." She signed this part twice; once after the above words, and again where her seal is affixed; and directly opposite to the latter is the word "witness," and immediately under it are the names of the witnesses; and the question is, whether from this it is to be understood that they attested, or, in other words, were witnesses to any thing, and if so, how much?

And, first, it must be asked, for what purpose was this *testimonium* clause introduced, or rather added? Certainly not to explain or qualify the will, or any part of it; to its provisions it has no allusion; but it respects the forms to be observed in the execution of the will, and those only. Why are we to assume that the testatrix was ignorant of the terms upon which alone her dispositions could be available? This the very language of the clause

itself shows that she did understand. The clause, therefore, having this object, we come to consider the purpose for which the witnesses are introduced; and I confess I cannot conceive it possible to understand the meaning of their presence, except to witness something. To suppose that the witnesses signed their names without any meaning or reference to what is alleged (opposite to their names) to have been done, seems to me to outrage all probability. If it be said, and with truth, that the witnesses cannot be presumed cognizant of the contents of a will, because that is contrary to experience, it is surely somewhat contrary to the same experience to suppose that, when the presence of the witnesses is to be accounted for only by their being brought there to witness something, certain ceremonies were performed, but that they saw nothing and knew nothing of them; and that, too, when the very language of the *testimonium* clause ("I declare," &c.) imports that she was making the declaration, not to the winds, but to persons to whom she might address herself, who were there to see and to hear.

If, then, the witnesses must (as I think they must) be understood to have attested something, I can see no possible reason for stopping short of the conclusion that they attested every thing which by the clause purports to have been done; that is, the signing, sealing, and publication, — the forms required. I shall not take up time in considering what is in point of law a publication. Lord Chief Justice GIBBS, indeed, * in the case of *Moodie v. Reid*, (a) is reported * 386 to have inquired of the bar what publication was; and that having received no answer, he expressed no surprise; from which I presume we are to understand that he considered it to be involved in some difficulty. If, however, a declaration before witnesses (present for the purpose of hearing it) that the document is the will of the testatrix, be not a publication, the question of Lord Chief Justice GIBBS will, probably, remain unanswered. I think that such is a publication, and that it can mean nothing else.

I come now to notice the cases upon which reliance is

(a) 7 Taunt. 855.

placed; which have been considered and reconsidered so often that I shall advert to them as briefly as possible, and that only in order to show that they are not precisely in point; and that therefore, for the reasons already given, they ought not, in my opinion, to govern the decision of the present case. They are, principally, *Wright v. Wakeford*, (a) *Doe v. Peach*, (b) and *Doe v. Pearce*. (c) In *Wright v. Wakeford* the power required "the consent of A. and B., testified by any writing or writings under their and his hands and seals, or hand and seal, attested by two or more credible witnesses." The attesting clause is, "sealed and delivered by the within named A. and B., in the presence of C. B. and G. B." Here the ceremony of signing was omitted in an attestation which professed to give an account of what had been done; and there was not, as in the present instance, a *testimonium* clause, which, by direct reference to it, could cure the omission. That this was the view taken by the learned counsel who argued the case, is apparent from the report: "Admitting"

(says he) "that if the attestation were general, the
 * 387 due observance of all the ceremonies might * be presumed, yet the same inference does not arise from a defective attestation." In the case of *Doe v. Pearce*, the power required "a deed or writing under hand and seal, attested by two or more credible witnesses." The attesting clause was, "signed in the presence of A. R., E. S., J. B.;" and the defect was, that there was no notice of sealing. In the next case, of *Doe v. Peach*, the power required that "R. P. and T. P. should give, grant, convey, &c., by some deed or writing under both their hands and seals, to be duly executed by them, and attested by two or more credible witnesses." The attestation was, as in *Wright v. Wakeford*, "sealed and delivered by the said R. P. and T. P., in the presence of T. M., E. S." The want of signing, apparent upon the attestation, was the defect which prevailed.

On the other hand, in the case of *Moodie v. Reid*, signing and publication were requisite, and the attestation clause

(a) 17 Ves. 454; 4 Taunt. 213.

(b) 2 M. & Sel. 576.

(c) 6 Taunt. 402.

was, "signed this 4th day of February, 1812. Witness, B. H., J. H." The defect was in the publication. Lord Chief Justice GIBBS, however, expressly declared that there was sufficient proof of signing; his language being, "the witnesses have clearly attested the signing." Now this could only have been so held by referring (not to the body of the will, which is going much further, but) to the *testimonium* clause, which is all that is requisite in the present case. Again, in *Stanhope v. Keir*, the power was, "to dispose by will, signed and published in the presence of and attested by witnesses." The conclusion of the will was, "This is my last will and testament, made and signed 19th November, 1818. Eugenia Keir." Thereupon Sir J. LEACH observed, that he could not assume more from the attestation than the signing; but that which he did assume (*viz.*, *the *388 signing) could only have been by connecting the attestation with the *testimonium* clause. In the case of *Buller v. Burt* (a), the power was to dispose by deed "sealed and delivered in the presence of and attested by witnesses." At the end was, "signed and sealed by L. S. Witness, J. P., H. B." Sir J. LEACH held the delivery not to be attested, but observed, "that where the word 'witnesses,' without more, is used, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed; and that as it was not stated therein that it was delivered, the word 'witnesses' could affirm no more than was contained in the deed itself." These remarks, I presume, are to be understood as referring to the *testimonium* clause, which is sufficient for the present purpose. The last case which I shall notice is *Ward v. Swift*. (b) There the power required a will "duly executed and published in the presence of and to be attested by three or more credible witnesses." The attestation was, "signed, sealed, and delivered in the presence of three witnesses." The question was whether publication was proved; and the Court of Exchequer held that it was by the fact of delivery, which, at all events, was not a literal compliance with the power.

(a) Cited in 4 Ad. & El. 15.

(b) 1 Cr. & M. 171.

In conclusion, I cannot avoid remarking that, in my humble judgment, the decisions upon the Statute of Frauds, so closely in *pari materia*, have not had their due weight in the consideration of the present case. It might have been supposed that a statute of the realm, under which such a mass of property has been disposed of during a period of near two centuries, — a statute upon which such eulogies (upon the justice of which I shall not stop to inquire) have been
 * 389 * bestowed, — might have had, as it surely deserved, as much attention and observance as the will or whim of a private individual; but to too much wisdom it has seemed otherwise. In the construction of that statute the thing required has been (according to all sense and reason it ought) that the form thereby prescribed should be proved to have been complied with, but that the simple attestation by the word “witness” is sufficient. But in the case of a power, even if the things required by it be in the very words and letters of the Statute of Frauds (*viz.*, “attested and subscribed in the presence of the devisor, by three or more credible witnesses”), a will, which would be clearly good under that statute, is to be held invalid without the addition of an idle formula.

The result is that, in my opinion, the power was duly executed.

MR. BARON GURNEY. — My Lords, the argument which I have heard at your Lordships’ bar has failed to convince me that the opinion which I gave on this case in the Exchequer Chamber (*a*) was erroneous. That opinion is, that the power in this case was well executed. I am of that opinion, even if it is to be taken that the case of *Wright v. Wakeford* (*b*) was well decided, and that it is still to be allowed to prescribe the rule in cases of this description. The case of *Wright v. Wakeford*, I humbly conceive, went to the extremest verge, and I cannot consent to be governed by it, except in a case which shall correspond in all its parts. In that case the terms of the power were, “by any writing under their hands

(*a*) 9 Ad. & El. 946.

(*b*) 17 Ves. 454; 4 Taunt. 213.

and seals, attested by two or more credible witnesses. The form of the attestation was, "sealed and delivered by the within named * A. B. in the presence of," &c. * 390 The objection was, that the attestation did not extend to the signing; as the witnesses attested the sealing and delivery, it was said it must be presumed that they did not mean to attest the signing. The case was sent to the Court of Common Pleas by Lord ELDON. Chief Justice MANSFIELD was of opinion that the execution was good; the other three Judges were of opinion that it was not. Upon those certificates being returned, Lord ELDON acted on the opinion of the majority of the Court. It is impossible to speak of Lord ELDON and the three Judges of the Common Pleas (Justices HEATH, LAWRENCE, and CHAMBRE) but in terms of great respect; nevertheless, with all the respect which is due to their authority, I cannot but think it most unfortunate that this decision was ever made. It has led to great injustice, it has disappointed the just expectations of settlors and devisors, and involved the Courts in great difficulties. It seems that if the word "attested" had not been in the power, the decision would have been the other way; and it is to be observed that the argument proceeds upon the supposition that a general attestation would have been sufficient. If the case now before your Lordships had been the case then under consideration, I think that the decision would have confirmed the execution of the power.

In the case of *M'Queen v. Farquhar*, the power directed the instrument to be signed and sealed in the presence of witnesses (but did not require an attestation), and the attestation was to the sealing and delivery: Lord ELDON held that the execution was good, and said it would be a miscarriage in a Judge if he did not direct a jury to presume that the deed was signed, as it professed to be upon the face * of it, in the presence of the witnesses who attested * 391 the sealing and the delivery. (a) I would take the liberty to suggest that it cannot be too much for a Judge to make the same presumption which he may direct a jury to make.

(a) 11 Ves. 467.

Other cases, which have been cited in the argument, and in the judgments of my learned brothers who have already given their opinions, have been decided upon the authority of *Wright v. Wakeford*. In the last two cases that have come before the Courts the extreme severity of the rule has been somewhat relaxed. In *Simeon v. Simeon*, (a) the power directed the will to be signed and published in the presence of and attested by witnesses. The form of the attestation was, "signed and delivered in the presence of," &c. In that case the power was decided to be well executed. In *Ward v. Swift*, (b) a case sent by the Lord Chancellor to the Court of Exchequer, the power was by will, to be "published under hand and seal, in the presence of and attested by three witnesses;" the attestation was, "signed, sealed, and delivered;" the Court decided the power to be well executed. In both these cases the word "delivered" was held to be equivalent to "published."

In the case now before your Lordships the power is by will, to be "signed, sealed, and published in the presence of and attested by three or more credible witnesses." In execution of the power, the testatrix commences her will thus: "I, Lydia Henning Skynner, do publish and declare this to be my last will and testament;" and then, at the conclusion, she says, "I declare this to be my last will and testament.

In witness whereof I have to this my last will and tes-
 * 392 tament, contained in one sheet, set my hand and * seal,
 the 12th day of September, in the year of our Lord
 1789. Lydia Henning Skynner. Witness, Charles Ball,
 Elizabeth Ball, Anne Ball." And the special verdict finds
 that "the will was signed, sealed, and published by Mrs.
 Skynner in the presence of the above witnesses, and attested
 by them, and their attestation was in manner and form as
 appears in the instruments." It appears to me that the
 testatrix has done all that the power requires; she pub-
 lished, she signed, she sealed: the attestation is general;
 there is no selection of one thing from which it can be
 argued that the others are to be excluded. I think that it

(a) 4 Sim. 555.

(b) 3 Tyrw. 122.

is to be taken that the witnesses attested all that the testatrix did.

This is the opinion which I humbly tender to your Lordships, — even taking the case of *Wright v. Wakeford* to be law. It is necessarily with some hesitation and diffidence that I would, with all humility, submit to your Lordships' consideration whether that case should be allowed to stand ; it has never yet, I believe, received the sanction of this the ultimate Court of appeal. I have scarcely ever heard the case cited in the Courts below but Judges have expressed their regret that that case was so decided, and their sense of the injustice that it has done ; and more than once or twice I have heard it said, that although, while that case stood, they have felt themselves bound by it, yet, that if the question should come before this House, they should feel themselves at liberty to suggest the consideration whether the case should be allowed to stand. That case, and the cases which have been decided in deference to it, have adopted a principle of decision totally different from the principle upon which the cases on which the execution of wills under the Statute of Frauds have been decided. Neither the case of *Wright v. Wakeford*, nor any of * the cases * 393 founded upon it, would have been so decided if the validity of the wills had come under the Statute of Frauds. Why, I beg to ask, is so much more respect to be paid to the language which the caprice of a conveyancer may have dictated than the words of the legislature ? One conveyancer has used one form of expression, and another another, when all that they meant was just that which the Statute of Frauds had required.

My Lords, the view which I take of this case is conveyed by Sir EDWARD SUGDEN in so clear and forcible a manner that I beg leave to cite two or three pages of his invaluable work on Powers : “ The strong ground, however, against the rule has not yet been stated ; it is the construction which the Statute of Frauds has received,” &c. [The learned Judge having read from the 1st volume of the *Treatise of Powers*, from p. 817 to p. 821, 6th edit., proceeded :] The case of *Wright v. Wakeford* gave such a shock to the security of

titles, that part of its mischief was speedily remedied by an Act of Parliament, 54 Geo. 3, c. 168, intituled "An Act to amend the Laws respecting the Attestation of Instruments of Appointment and Revocation, made in exercise of certain Powers in Deeds, Wills, and other Instruments." That Act provided (but retrospectively only) that an instrument (if duly signed and executed, and in other respects duly attested) should have the same force and effect as if a memorandum of attestation of signature had been subscribed by the witness expressing the fact of sealing, or sealing and delivery; and it is not to be denied that that statute, having corrected one part of *Wright v. Wakeford*, and having left the remainder untouched, affords some sanction to the authority

* 394 of that case. Sir E. SUGDEN, I humbly * think, observes justly (p. 324), that "it is much to be regretted that the measure was not made at once a complete remedy for the evil which it professed to cure. Every sound principle of legislation required that the Act should be prospective; the Act, however, was limited, in its progress through Parliament, to a retrospective operation." All the difficulties would be obviated by a decision by this House, applying to these cases the principle of the whole current of authorities on the Statute of Frauds; and now that this point is completely before your Lordships, I am unwilling to relinquish the hope that the case of *Wright v. Wakeford* may be overruled.

MR. JUSTICE PATTESON. — My Lords, the power set forth in the special verdict referred to by your Lordships in these cases requires that any will by which it is to be exercised shall be "signed, sealed, and published in the presence of and attested by three or more credible witnesses." The first question which arises appears to me to be, what is the meaning of the word "attested"? Now the fair meaning of the previous words, "in the presence of three or more credible witnesses," must be that three or more credible persons should see what is done, not merely that they should be present, without having their attention drawn to what is done; therefore, the word "attested," if it have any meaning at all,

must import something more than merely being present and seeing what is done. Independent of authority, I should have thought that it meant this, and no more; namely, that the will must not only be signed, sealed, and published in the presence of witnesses, but that those witnesses must affix their names to it. I find, however, that a sense has been given to the word "attest," when found in a power, in a long series of decisions, from *Wright v. Wakeford* * 395 downwards, by a great number of eminent Judges, according to all which, without exception, as I understand them, the word "attest" means, "certify by their signature, and by written expressions, that the formalities required by the power have been complied with," or to that effect. The authority of those decisions appears to me to be much too strong to be resisted, and I agree that it would be very dangerous, especially in matters regarding real property, to unsettle established rules, on which probably many titles may depend. Some of those decisions are undoubtedly in cases where the memorandum of attestation has stated some of the requisite formalities and omitted others, and those cases might have been decided on the ground that "expressio unius est exclusio alterius;" but I do not find that such ground was taken in them; and in some other cases it could not have been taken, because the memorandum was general. I am obliged, therefore, to come to the conclusion, that if the memorandum of attestation is in this case to be considered as consisting of the words "Witness, Charles Ball, Elizabeth Ball, Ann Ball," and no more, this will is not attested at all within the meaning of the power.

The second question which arises is, whether any and what part of the body of the will itself is to be considered as forming part of the memorandum of attestation? I have great difficulty in saying that any part of the body of the will can be so considered. The language of the body of the will is that of the testator, and not of the witnesses, who need not, and in practice do not, in general see or read any part of the will. The language of a memorandum of attestation, on the other hand, is that of the witnesses, and I am at a loss to see how one can fairly be taken as *incorporated * 396

with the other. In the case of *Moodie v. Reid*, (a) the Court of Common Pleas seemed to consider that the concluding part of the will, or at all events the signature, might be taken as part of the memorandum of attestation (which was, as here, quite general, being only the word "witness"); but they did not determine that point, for they held the will insufficient because the publication was not attested. So also in *Stanhope v. Keir*, (b) Sir J. LEACH said that he could not take the attestation, which was merely by the words "in the presence of," to extend to more than the signing; but he held the will bad, and therefore did not determine the present point. Why it might extend to the signing, and not to the publication, he does not explain, nor did the Court of Common Pleas in the case of *Moodie v. Reid*; and I confess it appears to me that such a distinction is entirely without foundation, and was plainly unnecessary to the decision of either of the cases. So, again, the same learned Judge, in *Buller v. Burt*, (c) expressed himself still more strongly; but as he held the execution bad in that case also, the present point was not determined. I have not been able to find any case in which it has been held affirmatively that any part of the body of an instrument can be imported into the memorandum of attestation so as to show, and to make the witnesses certify in writing, what it is which they profess to attest. Neither do I find the contrary expressly decided anywhere; and I do not think that the cases of *Wright v. Wakeford*, (d) *Doe v. Peach*, (e) *Wright v. Barlow*, (g) *Hougham v. Sandys*, (h) *Allen v. Bradshawe*, (i) and some similar cases, even impliedly decide the point; for in those

* 897 * cases the maxim, "expressio unius est exclusio alterius," seems to me to apply, and to prevent the importing the words of the party executing the instrument into the memorandum of attestation, and adding them to the words of the witnesses there used. The recent cases of *Simeon v.*

(a) 7 Taunt. 355.

(b) 2 Sim. & Stu. 37.

(c) 6 N. & M. 281, n.

(d) 17 Ves. 454.

(e) 2 M. & Sel. 576.

(g) 3 M. & Sel. 512.

(h) 2 Sim. 95.

(i) 1 Cur. Ecc. Rep. 110.

Simeon (a) and *Curteis v. Kenrick*, (b) and similar cases, where equivalent words used in a memorandum of attestation have been held sufficient, do not appear to me to bear upon this question. In ancient times, no doubt, the clause of *his testibus* was part of the instrument, and the names of the witnesses were inscribed in it; and when the names of the witnesses came to be put at the bottom of the instrument itself, they might, for many purposes, be considered still as part of the instrument; but when a power requires that the instrument should be attested, — assuming that the construction of that word which I have before stated is the right one, — it appears to me, in the absence of any direct authority, that the instrument itself and the memorandum of attestation ought to be considered as quite distinct from each other, and as being the acts and the language of different parties; that the memorandum of attestation ought to be complete in itself, and that any omission or defect in it cannot be supplied or cured by reference to the instrument.

For these reasons, I am of opinion that the power in this case was not duly and effectually executed by the will.

MR. BARON PARKE. — My Lords, if the question proposed by your Lordships had now arisen for the first time, I feel little doubt that I should have answered it by stating to your Lordships that the power was well executed; and that, on the ground that, where * the donor of a power * 398 requires an instrument to be executed with certain formalities, in the presence of and to be attested by credible witnesses, he does not require the witnesses to sign a memorandum of attestation expressing that all the formalities were complied with, but simply to put their names to the instrument as witnesses; and if there had been a special verdict and writ of error in the case of *Wright v. Wakeford*, (c) and I had been called upon by your Lordships to give an opinion on the propriety of that decision before it had been confirmed by others, I should probably have given my humble advice to your Lordships that it ought to be reversed. The decision,

(a) 4 Sim. 555.

(b) 3 M. & W. 461.

(c) 4 Taunt. 213.

however, in the case of *Wright v. Wakeford* not having been reversed, but, on the contrary, followed in others, none of which have been questioned before the highest tribunal, and having been recognized by an Act of Parliament (54 Geo. 3, c. 168), I think myself bound by the authority of that and the subsequent cases ; and feeling so bound, I regret that I have to answer the question proposed by your Lordships in the negative.

In the Court of Exchequer Chamber I gave my reasons for the opinion which I had formed ; and as my judgment is printed, together with that of the other Judges of that Court, (a) I think it unnecessary to trouble your Lordships with a repetition of those reasons. The argument at your Lordships' bar has not induced me to think that they were wrong, or to qualify or alter the judgment I pronounced. That judgment was founded upon the supposition that the cases had established a rule of construction, that if the donor of a power required an instrument to be executed with cer-

tain formalities in the presence of and attested by witnesses, he must be understood to * mean not only that the instrument but all the required formalities shall be attested by the witnesses, and stated by a memorandum in writing to have taken place in their presence ; the presumed intention being, that there should be on the face of the instrument itself a memorandum that all the conditions necessary to the due execution of the power have been complied with. I have heard nothing from the learned counsel who have argued the case, nor from the learned Judges who have delivered their opinions, to lead me to doubt that this rule of construction had been established by the case of *Wright v. Wakeford* and the subsequent authorities ; and it is remarkable that on this point the opinions of all the Judges in the Courts below, both those of the Queen's Bench and Exchequer Chamber, agree, and I certainly consider it to be incontrovertibly established.

The only question, then, appears to me to be whether this attestation can be so connected with the statements in the

(a) 9 Ad. & El. 969.

will itself, or some of them, as to import that all the requisites intended by the donor of the power were seen by the witnesses; this being the ground upon which the Court of Queen's Bench proceeded. I have fully stated in my former judgment the grounds upon which I came to the conclusion that this could not possibly be done; and that conclusion is unaltered. I deem it unnecessary to add any thing further. My opinion, therefore, is, that the power was not well executed.

I am desired to say to your Lordships that my brother ALDERSON wishes to give his opinion that the will was not duly executed. It is the opinion he formerly gave, (a) and which has not been altered by hearing the argument at your Lordships' bar.

* THE LORD CHIEF JUSTICE TINDAL. — My Lords, in * 400 answer to the question proposed by your Lordships to her Majesty's Judges, I beg to state that the opinion at which I have arrived is, that the power given to the testatrix by the settlement has been duly and effectually executed by her will.

The opinion of such of my learned brethren as have held the execution of this power to be defective has not been grounded upon any apprehension of danger, that if the attestation in the present instance is allowed to be good, the restrictions imposed by those who created the power will have been frustrated or evaded; on the contrary, all admit, what indeed is expressly found by the jury, that every requisite which the settlor imposed, except the form of the attestation, has been duly observed, the will having been in fact signed, sealed, and published by the testatrix in the presence of three credible witnesses; but they rest their opinions upon the authority of cases, of which that of *Wright v. Wakeford* is the earliest and the leading authority, that the memorandum of attestation, in order to make it a good attestation within the words of the deed which creates the power, must specify and

(a) 9 Ad. & El. 951.

enumerate the several particulars which are required by such deed; and that the attestation now under consideration on the authority of that case cannot be held to contain such enumeration. Most of those who have given their opinion against the due execution of this power have accompanied it with expressions of regret that they have been compelled so to do by the authority of that which is called the leading case; and many, on former occasions, where the authority of that case has been examined and discussed, have stated their

wish that the doctrine derived from it should be reconsidered * 401 when an opportunity offered before the House of Lords: from which I infer that the propriety of the decision in that case is not entirely acquiesced in, and that, at all events, in their judgment it ought never to be held as an authority to bind future cases which do not strictly and in every particular fall within its terms.

My Lords, it is upon the precise ground that I think this case is distinguishable from that of *Wright v. Wakeford*, and those which have followed it, that I now humbly offer my opinion to your Lordships in favour of the execution of the power. I propose very briefly to refer, in the first place, to those decided cases. In *Wright v. Wakeford*, (a) which is the earliest, the power required the appointment to be "by any writing under hand and seal, attested by two or more credible witnesses." The memorandum of attestation in that case was "sealed and delivered," omitting the word "signed." The three Judges who certified their opinion to the Court of Chancery that the execution of the power was defective, expressly ground it on the consideration "that the point in question is, simply, whether the attestation written on the deed asserts both the facts, the signing as well as the sealing," that is, whether the word "sealed" necessarily implied that the parties who put their seals to it put also their hands to it, or "signed" it, in the presence of the witnesses; and they held it did not, and that the execution was therefore bad, as the attestation mentioned the sealing only, and

(a) 17 Ves. 454; 4 Taunt. 213.

omitted the signing. The three cases which followed, viz., *Doe v. Peach*, (a) *Doe v. Pearce*, (b) and *Wright v. Barlow*, (c) presented, each, the very same ground of objection, as to their respective forms of attestation, with the former; * namely, that the power required two or more * 402 acts to be done, and the memorandum of attestation mentioned some only, omitting the rest. None of those cases presented any new question for the Court, but they were decided on the express ground that they could not be distinguished from it; Lord ELLENBOROUGH observing, in *Doe v. Peach*, "that if it was thought proper to agitate the question further, it should be brought before a Court of error." And in giving the latter judgment Lord ELLENBOROUGH also observed, "that the intention was that the attestation should be coextensive with the things required to be done; and this makes the case directly the same as *Wright v. Wakeford*."

I consider, therefore, the rule deducible from those cases to be, that wherever it does not appear by the attestation itself, either by express enumeration and specification or by necessary intendment, that every solemnity prescribed by the instrument creating the power has been complied with, the execution of the power is bad; and that the four cases above referred to have also established affirmatively, that a memorandum of attestation mentioning the observance of some or one only of several solemnities required, and omitting the mention of one or more, is not an attestation within the meaning of the instrument creating the power. But the present attestation does not, as it appears to me, fall within the latter predicament, and it is upon this precise ground that my opinion is rested; viz., that the attestation of the will of Mrs. Skynner does not express some only of the solemnities directed to be observed and omit the rest, but by necessary intendment shows that all have been observed. It might, indeed, be argued that it mentions none expressly, and is therefore bad upon that ground; but it cannot be held bad on the ground upon which * *Wright v. Wakeford* was deter- * 408

(a) 2 M. & Sel. 576.

(b) 6 Taunt. 402.

(c) 8 M. & Sel. 512.

mined. I do conceive, however, that the signature of the names of the witnesses immediately underneath the general word "witness" at the foot of the will, constitutes a good attestation; the same being free from the objection raised by those cases, and being supported by the authority of others, to which I shall afterwards refer; for if that word is taken abstractedly by itself as constituting the whole of the attestation, I can see no objection to holding that the three persons whose names are subjoined to it must be taken to be witnesses to all that was actually done at the time, which is found by the special verdict to be all that was required to be done; or if the word "witness" is to be construed with reference to the statement immediately preceding it at the end of the will (and one or other must be the sense to be put on the word "witness"), then the word "witness" necessarily implies that the testatrix did in their presence declare the instrument to be her will, and that she did in their presence put her hand and seal thereto, that is, in the language of the settlement, that she "signed, sealed, and published" it, in the presence of those three witnesses; for I think it cannot be contended successfully, that if a testatrix declares an instrument which she executed to be her will, any other publication beyond such declaration can possibly be required.

To this construction an objection was taken by the counsel at your Lordship's bar, which has also been relied upon by some of the learned Judges who have delivered their opinions before me; viz., that it proceeds upon the supposition that the whole of the instrument may legally be read together to explain the meaning of the word "witness," and that it supposes the witnesses are cognizant of the contents of

* 404 the *instrument; neither of which circumstances can be supposed. I cannot feel the force of this objection. There has been from the earliest time at which deeds were known a marked and acknowledged distinction between the operative part of the deed itself and the *testimonium* clause at the end of the deed. The essential part of the deed is properly that part, and that only, which contains the grant; the clause at the end is introduced, not as constituting any

part of the deed, but merely to preserve the evidence of the due execution of it. Admitting, therefore, the deed itself is matter which may be properly held to be confined to the knowledge of the parties, namely, the grantor and the grantee, the *testimonium* clause is expressly introduced into it for the use of the public and the witnesses to the deed.

It is well known that a similar clause was constantly inserted in old deeds and charters at the close thereof, beginning with the words "*his testibus*," and thence generally called the *his testibus* clause, in which the names of the persons present who heard the deed read by the clerk were written, not by themselves, but by the clerk who prepared the deed. Spelman, in his Glossary, p. 228, traces out the variations in the form of the clause at different periods of our history; and Madox, in the Dissertation prefixed to his *Formulare Anglicanum*, goes more fully into the matter, and in the work itself gives numerous instances, which it is impossible to read without being satisfied that the sense requires that the witnesses, whose names are inserted in the *his testibus* clause, must of necessity have known the words preceding it, or in fact they would have witnessed nothing at all. Take, for example, among many, that numbered 312: "And that this my gift, grant, and confirmation may * remain * 405 firm for ever, I have confirmed this present charter with the impression of my seal. *His testibus*," &c.; or again, No. 631: "And for the greater security of my obligation, have made oath and put my seal to this present writing. *His testibus*," &c. Who can doubt for a moment that these witnesses either actually read or heard read over to them the words of the deed immediately preceding their names, and that the introduction of that preceding clause had no other object or purpose? And this practice continued down to the reign of Henry 8, as appears on the authority of Lord COKE (2 Ins. 78), who states the practice then began of separating the attestation from the deed itself, and for the witnesses to subscribe their own names to it, either at the bottom or indorsed on the deed.

But that the clause "*in cujus rei testimonium*," so long as it was found at the close of the deed, never formed part of

the deed itself, is evident from Shepard's Touchstone (p. 55), where he says, "a deed is good, albeit these words in the close thereof, 'in cujus rei testimonium sigillum meum apposui,' be omitted," citing the authorities, which show it is no more in fact than what it imports to be, — the very attestation of the deed which has preceded it.

There is, therefore, no reason why the word "witness," written immediately after this *testimonium* clause in the case now under consideration, should not be considered as incorporated with it, and as calling the attention of the witnesses to all that had preceded in the *testimonium* clause. On the contrary, there is every reason why it should have that effect; the bare inspection of the *fac-simile* set out in the appendix to the case of the defendant in error showing as much, and the sense and context also proving that it must have been

written for that very purpose, and no other; and this
 * 406 appears to me to be the answer to the * argument on the ground of the danger which is apprehended if the witnesses must necessarily be supposed to be cognizant of the contents of the deed; for the witnesses are not supposed to be cognizant of the contents of the deed, but of the *testimonium* clause only, which is introduced for their express use, and for that express object and purpose.

If all the particulars of the solemnities required by the instrument creating the power were formally enumerated in this will just before the *testimonium* clause, and therein stated to have been performed, and if the three witnesses had signed their names beneath the word "witness" immediately subjoined to that clause, it could not, I think, be denied that such attestation would be sufficient; whilst it is admitted that if the very same particulars were repeated in a separate attestation at a small distance below the will, and such attestation is signed by the very same witnesses, the latter attestation would be complete. This would be rather struggling for a formal than a substantial distinction, and would be in direct opposition to the acknowledged maxim in the construction of all instruments; namely, "ut res magis valeat quam pereat." And further, so far is it from being a rule of law that you may not, in the attestation to a deed,

look back to that which is found at the close of the deed itself, that, on the contrary, in most of the cases which have been relied on by the defendant in error express reference has been made to the close of the deed itself. Thus, in *Moodie v. Reid* the power is directed to be executed "by will signed and published in the presence of and attested by two or more credible witnesses;" and there are found at the end of the will these words; namely, "These my last bequests signed by me," and immediately beneath the word "witness" follow the names of the two witnesses. *Now, upon *407 this state of facts Chief Justice GIBBS says, "Here the witnesses have clearly attested the signing; the question is, whether they have attested the other formality, of publication?" (a) But how does it appear they have attested the signing, except by looking back to that which is inserted in the close of the will itself, and importing it into the attestation? Again, in the case of *Stanhope v. Keir*, (b) a direct reference is made to the words which are inserted in the will. The will concludes, "This is my last will and testament, made and signed," &c.; the words at the bottom of the will are, "In the presence of;" and Sir J. LEACH, V. C., said he could not assume more from the attestation than that the witness saw Mrs. Keir sign the instrument; and held the execution bad, where the power was directed "to be signed and published" in the presence of and attested by three witnesses. But in that case, as in the former, the Court looks back to the statement of the testatrix contained in the will itself, in order to see what it is that the witnesses attest. And lastly, the authority of Sir J. LEACH, in the case of *Buller v. Burt*, (c) is express to the very point that where the word "witnesses," without more, is used in the attestation, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed.

It appears, therefore, upon the authority of these cases, that the Court does look back beyond the general word of attestation, whether it be "witness" or "in the presence

(a) 7 Taunt. 861.

(b) 2 Sim. & Stu. 37.

(c) Cited in 4 Ad. & El. 15; 6 Nev. & M. 281, n.

of," to the concluding clause of the will itself, to discover what it is that the witnesses do attest; and in the present case, if such reference is made, I think it appears upon * 408 the face of the will * that the witnesses do attest the signature, sealing, and publication of the will, which are all the solemnities prescribed by the settlement for the execution of the power.

For these reasons, the opinion which I offer humbly to your Lordships is, that, under the particular circumstances of this case, the power is well executed.

The causes were adjourned for further consideration.

August 18.

THE LORD CHANCELLOR. — The question in these cases is, whether the will of Mrs. Skynner was a good execution of the power contained in her marriage settlement. The power required that the will should be signed, sealed, and published by her, in the presence of and attested by three or more credible witnesses. The will is set out in the special verdict, and it is found to have been signed, sealed, and published by her in the presence of the three witnesses named therein, and attested by them, and that their attestations are in manner and form as stated in the said instrument. The will concludes thus: "I declare this only to be my last will and testament. In witness whereof I have to this my last will and testament, contained in one sheet, set my hand and seal the 12th day of September." Then follows the signature of the testatrix at the bottom of the page; and on the top of the following page it goes on thus: "In the year of our Lord 1789." The signature is then repeated; and on the side, in the usual place where witnesses sign, is the word "witness," and the names of the three witnesses are subscribed thereto.

If this question were entirely new, I think your Lordships would have felt very little difficulty in deciding it. The will is to be signed, sealed, and published in the presence * 409 of and attested by three credible * witnesses. It was in fact signed, sealed, and published in the presence of the witnesses; it is so found by the special verdict; and

they subscribed their names to it, attesting it as witnesses. I think if this had come before your Lordships unaffected by previous decisions, you would have been disposed to consider this a sufficient execution of the power; and the more so, as under the Statute of Frauds, which requires that all devises shall be in writing, and signed by the testator, and shall be attested and subscribed in the presence of the devisor by three or more credible witnesses, it has been held that an attestation containing only the words "sealed and delivered by," &c. (omitting the words "signed"), is a sufficient compliance with the statute.

But it is contended that the question is controlled by previous decisions, and it becomes necessary therefore to consider how far they apply to and govern this case. The first and leading authority, and upon which in fact all the others depend, is that of *Wright v. Wakeford*. (a) In that case the power was to be executed by the donees, testified by any writing under their hands and seals, attested by two or more credible witnesses. The attestation contained the words "sealed and delivered," and nothing more: only two of the requisites were attested; the signing was omitted. It was contended that the word "sealed" implied that the parties who put their seals also put their hands to the instrument: but the majority of the Judges were of opinion that it did not so imply, according to the true interpretation of the word "sealed." This decision turned, therefore, entirely upon the construction of the clause of attestation; and undoubtedly, if two of the requisites were inserted, and the third omitted, * the attestation could not be cor- * 410 rect: the signature of the witnesses to the memorandum was an attestation to the sealing and delivery only. The cases of *Doe v. Peach*, (b) *Wright v. Barlow*, (c) and *Doe v. Pearce*, (d) were decided entirely on the authority of *Wright v. Wakeford*, and do not appear to me to carry the rule further.

Notwithstanding the doubts which have been entertained as to the propriety of the decision in *Wright v. Wakeford*,

(a) 17 Ves. 454; 4 Taunt. 213.

(b) 2 M. & Sel. 576.

(c) 3 M. & Sel. 512.

(d) 6 Taunt. 402.

and the repeated expressions of regret by very learned Judges that that case had been so decided, still as it has been so frequently acted upon, and for so long a period, I should have felt it my duty, if this case had not been distinguishable from it, to recommend to your Lordships to adhere to that decision, and pronounce the execution of the power in the present instance to be insufficient. Certainty as to the rules affecting property and its disposition is of far more consequence than the consideration of what the rules should be; because the transactions of mankind are regulated accordingly. But the question here is not, as in *Wright v. Wakeford*, whether a memorandum of attestation, mentioning some of the requisites and omitting others, is valid; but whether the general memorandum is in this case sufficient. And first, it is worthy of observation, that the language of the power and the grammatical construction of it are not the same in this case as in *Wright v. Wakeford*. There the power was to be executed by any writing under the hands and seals of the donees, attested, &c. The writing under hand and seal, which may be considered as a description of the completed instrument, was to be attested. But in this case the power is to be executed by a writing, to

be by the donee signed, sealed, and published in the
 * 411 presence * of and attested by three or more witnesses.

The word "attested," in grammatical construction, relates only to the word "writing;" not, as in the case of *Wright v. Wakeford*, to the whole description, viz., under hand and seal. It would not, therefore, I think, necessarily follow, that because the insertion of the words "sealed and delivered" in the memorandum of attestation might be considered requisites in the former case it would also be necessary in the present. In *Doe v. Peach* and *Wright v. Barlow* the words are the same as in *Wright v. Wakeford*. Independently, however, of this distinction, and without relying upon it, there is no case which has decided that a general attestation is not sufficient; and I see no reason why, if there be a general attestation, and the witnesses prove that all was done that was required to be done, such a general attestation should not be sufficient. In this case the attestation follows

immediately after the *testimonium* clause, and may, I think, be considered as referring to and connected with it.

In *Moodie v. Reid*, (a) the testatrix concluded her will thus: "These my last bequests, signed by me this 4th day of Feb., 1812; Sarah Moodie. Witness, B. H., J. H." Chief Justice GIBBS in that case said, "Here the witnesses have clearly attested the signing." But the attestation was general, and they could have only been considered as attesting the signing by connecting the attestation with the words that immediately preceded it, "These my last bequests, signed by me."

Again, in the case of *Stanhope v. Keir*, (b) before Sir J. LEACH, the will concluded thus: "This is my last will and testament, made and signed," &c.; it was signed by the testatrix, Eugenia Keir. The attestation was as follows:

"In the presence of;" then * followed the names of * 412 the witnesses. The Vice-Chancellor considered this a sufficient attestation of the signing, which could only be by reference to the *testimonium* clause.

The case of *Buller v. Burt*, (c) before the same Judge, when Master of the Rolls, is to the like effect. In that case the deed concluded as follows: "Signed and sealed, &c., by L. Smith" (the signature of the grantor): "Witness;" then followed the names of the witnesses. The Master of the Rolls said, that "as the general word 'witness' can affirm no more than the deed states, there is in this case no attestation of that essential part of what is required for the due execution of the power, the delivery of the deed; the power, therefore, is not well executed." In a former part of his judgment he speaks of the "body of the deed;" but it is obvious, I think, that he means the *testimonium* clause. In using the terms "body of the deed," he uses them as distinguished from the attestation. In this, therefore, as in the former case, he seems to have considered a reference to the *testimonium* clause legitimate.

In the present case, the reference would embrace all the

(a) 1 Madd. 516; 7 Taunt. 355.

(b) 2 Sim. & Stu. 37.

(c) 6 Nev. & M. 281, n.; see also 4 Ad. & El. 15.

requisites for the due execution of the power, and render it complete. These considerations lead me to the conclusion that the power was properly executed, and I recommend your Lordships, therefore, to reverse the judgment of the Exchequer Chamber; the effect of which will be to affirm the judgment of the Court of Queen's Bench; and in following this recommendation, your Lordships will conform to the opinions of the Chief Justice of the Common Pleas and the majority of the Judges who were consulted by your Lordships upon the occasion.

* 413 * LORD BROUGHAM. — I entirely agree in the course recommended by my noble and learned friend. If this case had been — and this we all of us felt during the whole of the arguments — if this case had been in terms the same as, and was not distinguishable by any material difference from, the case of *Wright v. Wakeford*, followed by the two other cases of *Doe v. Peach* and *Wright v. Barlow*, which were in terms the same with *Wright v. Wakeford*, as regarded the material parts of the power and the facts of the execution; in that case even we should have been very reluctant to have run counter to that authority, and for the reason assigned by my noble and learned friend. I hardly know a case which has excited, at different times, more remark than the case of *Wright v. Wakeford*. It has been again and again questioned and criticised by the learned Judges; it cannot, therefore, be said to have been at any time a case that commanded any thing like the entire concurrence of Westminster Hall. Nevertheless, for the reasons assigned — judicially and soundly assigned — by my noble and learned friend, I should have been the last to recommend a departure from that case, overruling it and adopting the contrary principle of decision; because it is perfectly true, as was stated by my noble and learned friend, that in this as in all other cases, where a decision has been held to make the law; where it has been acted upon as that decision has been in other cases, two of which particularly have been mentioned by my noble and learned friend; where it has been acted upon by professional men, has been assumed by them to be the law, and has ob-

tained the faith of parties, and has regulated the transactions of men upon most material points affecting their most important interests, it is of the highest possible * im- * 414 portance, and even of absolute necessity, that the Court should not, without a very strong reason indeed to induce them so to do, depart from that rule ; it being of very much more importance, in nine cases out of ten, that the law should be known and fixed which is to regulate the advice of professional men, and to govern the transactions of their clients, than that, perhaps, the best possible rule of law should in each case be adopted. But here differences have been pointed out by my noble and learned friend, and dwelt upon by a considerable majority of the Judges, whose valuable assistance we had in disposing of this question ; and there is, no doubt, a perfectly sufficient difference in this case to justify us in reversing the decision of the Exchequer Chamber, and setting up the decision of the Court of Queen's Bench, and agreeing, therefore, with the majority of the learned Judges.

I shall not enter further into this case than to say that I certainly have felt, in the consideration I have been able to bestow upon it, that there is a manifest connection here between the attestation itself and the *testimonium* clause. This is the ground chiefly upon which I have formed my opinion upon this case ; and the more I have considered it after hearing it so very ably argued at the bar, the better I am satisfied with having come to that conclusion. I therefore, without troubling your Lordships at greater length, will merely state that I entirely agree with the reasoning of my noble and learned friend and of the majority of the learned Judges, in coming to the conclusion of a reversal, for those reasons which have led my noble and learned friend to that result.

* LORD CAMPBELL. — It gives me great satisfaction * 415 in this case to agree in opinion with the majority of the learned Judges. When your Lordships consult the Queen's Judges, I do not at all consider that you are bound by the opinion of the majority, or even by their unanimous

opinion, unless you are perfectly satisfied with the reasons which they assign for the opinion they give. But it is always a very painful thing to differ from those venerable magistrates, who are always to be looked up to with so much reverence and respect.

In this case the only question is, whether the will was attested by three credible witnesses. It is not at all disputed, indeed it is found by the special verdict, that it was signed, sealed, and published in the presence of the witnesses. The question is, whether it has been attested by them. The witnesses saw all these solemnities performed, and they signed their names to the will as attesting witnesses. The question is, Is not that will attested by them? Independently of authority, I cannot doubt that for a moment. The only objection that can be made is this: that the will upon the face of it does not contain any *proces verbal*, or history of the transaction. Well, but the power imposes no such condition; it does not say, "a will signed, sealed, and published in the presence of three witnesses, and attested by them, and a will containing a history of the solemnity." There are no such words in the power, and I know not how such a condition is to be added to the power which the donor has given.

Then, my Lords, I am very glad to think that there is no authority in this case to prevent us from giving the natural construction which such a power ought to receive, — a
 * 416 construction in analogy to the Statute of * Frauds, respecting the execution of wills. The testator is the donor of the power; and unless the donee complies with the solemnities required by the donor, the power is not well executed. Now the Statute of Frauds, as your Lordships are aware, upon this subject is almost *ipsissimis verbis* the same with the power, the construction of which we are now considering; and it has been determined over and over again, that if a will is properly executed in the presence of witnesses, and they simply sign the will, that is a due execution of the power, and the will is good under the Statute of Frauds.

With regard to powers contained in private deeds, we have *Wright v. Wakeford*, and the class of cases which have suc-

ceeded that case. Now, fortunately, it is not necessary for this House to overturn those cases to-day, although, had they been brought by appeal before this House in proper time, I apprehend that the probability is that your Lordships would not have approved of them. But in those cases there is not a mere simple attestation by witnesses, that is, the subscription of their names, but there is an imperfect history of the transaction. There is a declaration by them that they saw certain solemnities performed which are required by the power, without having seen all; and that maxim of law has been, I think, misapplied, that "the expression of one is the exclusion of the other;" and therefore this has been supposed sufficient to negative the performance of any solemnity which is not mentioned in the history of the transaction of the will. But there is no case, I am happy to think, in which there has been a simple signature by witnesses, the witnesses having seen all the solemnities duly performed, which has been held not to be a true execution of a power. If it were necessary, I think that * the *testimonium* clause here might be re- * 417 sorted to, both upon principle and upon authority. I beg leave humbly to express my opinion, that without that *testimonium* clause there would have been a good execution of the power; because here the will was signed, sealed, and published in the presence of three credible witnesses, who signed that will as the attesting witnesses. I say that that was an attestation, and that this is a good execution of the power, without reference to the *testimonium* clause. The very common expression we have, of "attesting witness" to a deed, explains this. What is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness. He is a good attesting witness, although there should not be upon the deed itself a memorandum, saying that it is signed, sealed, and delivered in his presence. These are good attesting witnesses; and I apprehend that upon principle, and not contrary to authority, this will was attested in the presence of three credible witnesses, and that therefore it is a good execution of the power. The consequence is that the judgment

of the Court of Exchequer Chamber will be reversed, and that of the Court of Queen's Bench affirmed.

LORD BROUGHAM. — There is no authority for saying that a general attestation of an instrument in execution of a power is insufficient.

THE LORD CHANCELLOR. — The party who sees the will executed is, in fact, a witness to it; if he subscribes as a witness, he is then an attesting witness.

In the case of *Skynner v. Spilsbury*, the judgment must be the same as in that of *Burdett v. Spilsbury*;
*418 *the arguments at the bar and the opinions of the learned Judges comprised both cases, both depending on the question whether the power was well executed.

The following order was then made in each of the cases : —

Ordered and adjudged, that the judgment given in the Court of Exchequer Chamber for the defendant in error, reversing a judgment of the Court of Queen's Bench for the plaintiffs in error be, and the same is hereby, reversed. And it is further ordered and adjudged, that the original judgment of the Court of Queen's Bench be, and the same is hereby, affirmed.

• RUTLAND v. WYTHER.

• 419

1842.

MARGARET RUTLAND *Plaintiff in Error.*
JOHN DOE, on the Demise of THOMAS } *Defendants in Error.*
WYTHER and MARY his Wife . . . }

Devise. Leasing Power, Execution of.

A will devising real estate gave a power to the devisees for life to demise and lease the same for any term not exceeding twenty-one years in possession, “so as upon every such lease there should be reserved and made payable, during the continuance thereof, the best improved yearly rent that could be reasonably had for the same, without taking any sum of money by way of fine or income for or in respect of such lease.” The first devisee for life, in exercise of this power, made a lease for twenty-one years from the 11th of October, 1833, at the yearly rent of 903*l.*, payable by equal half-yearly payments, on the 6th of April and 11th of October in every year, except the last half-year’s rent, which was thereby reserved and agreed to be paid on the 1st of August next before the determination of the said term.

Held by the Lords (concurring in the opinions of a majority of the Judges, and reversing the judgment of the Exchequer Chamber), that the lease was a valid execution of the power.

June 14, 15, 1842. June 19; August 18, 1843.

AN action of ejectment, brought in the Court of Exchequer by the nominal defendant in error, on the demise of Thomas Wythe and his wife, for the recovery of certain tenements in the county of Norfolk, against the plaintiff in error the tenant thereof, was tried at the Norfolk summer assizes in the year 1836, when a verdict was found for the defendant in error, subject to the opinion of the Court on a special case. That case was argued in the Court of Exchequer in 1837, and judgment was given for the plaintiff in error; (a) whereupon the special case * was turned into a special verdict, * 420 and the judgment being entered thereon, was brought

(a) 2 M. & W. 661.

by writ of error into the Exchequer Chamber, and there reversed. (a) The present writ of error was brought to reverse the latter judgment.

The facts contained in the special verdict, material to be here stated, were as follows: Benoni Mallett, who died in 1783, seised of the tenements in question, by his will dated the 28th of January, 1780, and duly executed, devised the same to his grandson, Philip Mallett Case, for life, with remainder to trustees to preserve contingent remainders; with remainders to the sons and daughters of the said P. M. Case, as in the will mentioned: and for default of such issue, the said testator, by his said will, devised the said tenements to his grandson, Thomas Mallett Case, for life, with remainder to trustees to preserve contingent remainders; with remainders to the sons of the said T. M. Case successively in tail male; with remainder to his daughter and daughters as tenants in common in tail general, &c.

The will contained the following power of leasing: "Provided always, and his will was, that it should and might be lawful to and for his said grandson, Philip Mallet Case, and all his sons, and all other person or persons respectively, as and when they should respectively come into and be in the actual possession of the said tenements, with the appurtenances, or any part thereof, or be actually entitled to the rents and profits thereof, by indenture under their respective hands and seals, to demise and lease the same, or any part thereof, unto any person or persons, for any term or

* 421 number of years, not exceeding twenty-one years, * in possession, and not in reversion, remainder or expectancy; so as upon every such lease there should be reserved and made payable, during the continuance thereof respectively, the best improved yearly rent that could be reasonably had for the same, without taking any sum or sums of money by way of fine or income, for or in respect of such lease or leases; and so as none of the said lease or leases were made dispunishable of waste by any express words therein; and that in every such lease there should be contained a clause of

(a) 5 M. & W. 688.

re-entry for non-payment of the rent or rents to be thereby respectively reserved; and so as such lessee or lessees, to whom such lease or leases should be made, sealed and delivered counterparts of such lease or leases."

On the testator's death Philip M. Case became, under the will, seised of the said tenements. Thomas M. Case died in 1800, leaving issue one child, Mary, one of the lessors of the plaintiff in the action; and who in the year 1810 intermarried with Thomas Wythe, the other lessor of the plaintiff.

By an indenture dated the 14th of December, 1833, under the hand and seal of the said P. M. Case, and made between him of the one part and the said Margaret Rutland of the other part, he, P. M. Case, being in actual possession of the said tenements, and actually entitled to the rents and profits thereof, in exercise of the said power of leasing, demised unto the said Margaret Rutland and her executors, administrators, and assigns, the said tenements, with the appurtenances; to have and to hold the same unto her and her executors, &c., from the 11th day of October then last, for and during the term of twenty-one years then next ensuing; yielding and paying therefor, unto the said P. M. Case and his assigns, during such * part of the term of that demise as * 422 he should live, and after his decease unto such person or persons as for the time being should be entitled to the reversion of the said premises under the said will, the yearly rent of 903*l.* by equal half-yearly payments, that is to say, on the 6th day of April and the 11th day of October in every year, in equal portions, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st day of August next before the determination of the said term. And it was thereby provided, that if the said rent, or any part thereof, should be unpaid for forty-two days next after any of the days whereon the same was reserved to be paid, or if the said Margaret Rutland, her executors, &c., should not perform the covenants therein contained, then in either of the said cases it should be lawful for the said P. M. Case or his assigns, during his life, and after his decease for such person or persons as aforesaid, into the said demised premises, or any part thereof in the name of the whole, to enter, &c.

P. M. Case died without issue in July, 1834, whereupon Mrs. Wythe became entitled to the said tenements as tenant in tail general under Benoni Mallett's will ; and she, and her husband in her right, sought by the said action to set aside the said lease, as not being in pursuance of the power of leasing contained in the said will.

The only question before the House was, whether so much of the lease as reserved payment of the last half-year's rent on the 1st of August, instead of the 11th of October, the last day of the term, was consistent with the leasing power. That question was argued on the 14th and 15th of June, 1842, in the presence of the learned Judges.

The Solicitor-General and *Mr. R. V. Richards*, for * 423 * the plaintiff in error, contended, generally, (a) that the lease was a valid execution of the power, that the judgment of the Court of Exchequer Chamber was erroneous, and that the judgment of the Court of Exchequer was right.

Mr. Pemberton and *Mr. Biggs Andrews*, contra, argued that the power was not well executed by the said lease, on account of the reservation of the last half-year's rent, whereby no rent was made payable from the 1st of August to the 11th of October in the last year of the term ; whereas, as they submitted, the rent ought to have been reserved equally during the whole term, and so that each person entitled to the reversion of the demised premises would receive the rent to accrue during the period for which such person should be entitled.

At the close of the arguments the following question was proposed to the learned Judges : " Whether the indenture of

(a) The reports, before referred to, of the arguments and judgments in the Courts below, and the full statements herein after given of the opinions of the learned Judges, render it unnecessary to report the arguments of counsel on the present occasion ; those for the plaintiff in error will be found in the opinions given by Barons PARKE and ROLFE, and Justices WILLIAMS, COLERIDGE, MAULE, and WIGHTMAN. Those for the defendant in error are contained in the opinions given by Chief Justice TINDAL, and Justices PATTESON and COLTMAN. The cases that were referred to will be found again cited by the Judges.

lease between P. M. Case and Margaret Rutland, dated the 14th of December, 1833, as stated in the special verdict, is a valid execution of the power of leasing, as also stated in the special verdict, given by the will of B. Mallett, dated 28th January, 1780."

The Judges desiring time to answer the question, the further consideration of the cause was postponed.

On the 19th June, 1843, the Judges again attended, and the Lord Chancellor informed the House * that * 424 . they differed in their opinions on the question; whereupon it was ordered that they should deliver their opinions *seriatim*, with their reasons.

MR. JUSTICE WIGHTMAN. — My Lords, it ap- ^{Opinions of the Judges.} pears to me that the lease set out in the special verdict is a good execution of the power of leasing contained in the will of Benoni Mallett. The power enables the devisee for life to grant leases for any number of years not exceeding twenty-one in possession, and not in reversion, remainder, or expectancy, "so as upon every such lease there be reserved, &c., the best improved yearly rent, &c., without taking any sum or sums of money by way of fine or income, &c., and that in every such lease there be contained a clause of re-entry," &c. The lease in question is for twenty-one years from the 11th October, 1833, yielding and paying to the tenant for life and his assigns during such part of the term as he shall live, and after his decease to the person entitled to the reversion, the yearly rent of 903*l.*, by equal half-yearly payments on the 6th of April and the 11th of October in every year, by equal portions, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st of August next before the determination of the term, with a proviso for re-entry if the rent should be unpaid for forty-two days next after any of the days whereon the same was reserved.

The jury have found that the rent reserved was the best improved yearly rent that could reasonably be had, and the lease would appear to be in accordance with the terms of the power literally. It is a lease in possession for not more than

twenty-one years ; there is reserved and made payable during the continuance of the lease the best improved yearly rent ;

no sum of money appears to have been taken by way
 * 425 of fine or * income, for or in respect of the lease ; and
 there is a clause of re-entry for non-payment of rent.

As no point was made upon the argument with respect to the clause for re-entry, I think it unnecessary to trouble your Lordships with any observation with respect to it. But it is said that the provision in the power that the best yearly rent be reserved and made payable during the continuance of the lease, is not fulfilled by a yearly rent made payable in each year, during the term for the whole of such year, but that the rent must be reserved equally throughout and during the continuance of the whole term and every part of the term ; so that up to the last moment of the term rent should be payable by the tenant, and that at whatever period of the year before its conclusion the remainder-man might come into the possession he ought to be entitled to receive rent from the tenant for his subsequent occupation.

Whatever arbitrary terms the grantor of the power may impose upon the party executing it, or however absurd or unreasonable they may appear to be, they must be fulfilled ; as if it were required that the lease should be witnessed by persons of a particular stature, or written upon paper of a particular colour : but when the party by whom the power is to be executed is not restrained by the express terms of it, there are no conditions to be added by implication, except such as are necessary to give effect to the conditions that are expressed. In the present case the rent reserved is a yearly rent payable in respect of the whole of each year, and is payable in each year : that fulfils the express conditions of the power. But it is contended that there is an implied condition for the benefit of the remainder-man that the rents

should not only be made payable during the year,
 * 426 * but proportionably during every part of the year up
 to the last moment, lest the remainder-man should by possibility find himself in possession of the estate at a period when all the rent for the current year has been paid up by the tenant : but do the express conditions of the power in-

dicare that such an implied condition is necessary in order to carry them, or the testator's intention to be gathered from them, into effect? The testator seems to have had no further regard to the interest of the remainder-man than that the estate should be let at the best yearly rent, and that no fine should be taken for the grant of the term generally which would have the effect of reducing the yearly rent; but the times for the payment of the rent in each year he has left open to the discretion of the grantee of the power.

Has, then, the grantee of the power exercised the discretion left to him as to the times of payment of rent in the year in such a manner as to contravene the express conditions, or the intent of the testator to be gathered from them? The discretion is to be exercised by the grantor at the time he grants the lease for twenty-one years; and if it is to be restrained at all, it must be by considerations of what, upon the whole, is most beneficial to both the parties, tenant for life and remainder-man; for it is not to be assumed that the grantor had greater regard for the interest of the remainder-man than of the tenant for life. There is obvious advantage and convenience in making the last half-year's rent payable before the end of the term. The remedy by distress is preserved and made available at a period of the year very convenient for the landlord, and effect is given to the clause for re-entry; and if the remainder-man came into possession at any period of the term before the 1st of August in the last year, he would derive great advantage from * that mode of reservation; but the remainder- * 427 man might possibly not come into possession until after the 1st of August in the last year, and from that time until the 11th of October there would be an interval during which no rent would be payable by the tenant.

Without stopping to inquire whether the remainder-man might or might not in such a case have some remedy against the representatives of the tenant for life, to recover his proportion of the last year's rent, it is obvious that the possibility of such a state of things could only be prevented by making the last half-year's rent payable at the end of the term, which would have the effect of depriving the landlord,

whether tenant for life or remainder-man, of the remedy by distress, — a most important circumstance to be taken into consideration, in determining the question whether the reservation of the last half-year's rent in the manner in which it is reserved, is or is not most beneficial for both parties upon a general view of their respective interests.

But it is said that if once the principle of reserving the rent payable at any time of the year be admitted, it might have been made payable at the beginning of each year. I have already observed upon the extent to which the grantor of the power has thought it necessary by the terms of it to guard the interests of the remainder-man, and it appears to me that such a reservation would be within the terms of the power. But it may be, though I am not prepared to say it would be, considered that such a reservation, though within the terms of the power, was in effect a fraud upon it. In the present case no fraud is suggested. It is agreed that the lease is a perfectly fair one; and the only question is, whether it is within the terms of the power.

* 428 * In the course of the argument two cases were cited and relied upon by the defendant in error, both of which are distinguishable from this case. In *Doe v. Giffard* (a) no rent at all was reserved for half a year of the term; the lease was for twenty-one years, and rent was reserved for twenty years and a half, under a power requiring the best yearly rents to be reserved; the lease, therefore, was clearly not according to the term of the power. In *Doe v. Morse*, (b) which was most relied upon, the power required that there should be reserved by half-yearly payments the best rent that could be obtained. The lease was to hold from the 4th of January, and the rent was made payable on the 1st of May and 29th of September. This, clearly, was not according to the power, which required the rent to be payable half-yearly. Mr. Baron BAYLEY, in giving his judgment upon that case, says, "That cannot be considered the best yearly rent which is not reserved at the conclusion of the year;" but that very learned Judge seems to have

(a) Cited 5 B. & Ald. 376.

(b) 2 Cr. & M. 247; Tyrw. 185.

overlooked the disadvantage arising from inability to distrain at the conclusion of the term in such a case. These cases, which were cited to show that the lease was not in conformity with the power, are clearly distinguishable from this; and as the reservation of the rent in this case is within the terms of the power, and not in contravention of the spirit or in fraud of the power, but affording an advantage to the landlord, whoever he might be, whether tenant for life or remainder-man, which he would not have if the last half-year's rent were payable at the end of the last half-year of the term, it appears to me that the lease was well executed.

MR. BARON ROLFE. — My Lords, in answer to your * Lordships' question in this case, I have to state that, * 429 in my opinion, the lease of the 14th of December, 1833, is a valid execution of the leasing power given by the will of Benoni Mallett. The only restriction contained in the power, as to the compliance with which any doubt has been raised, is that which requires that on every lease there should be reserved and made payable during the continuance thereof the best and most improved yearly rent that could be reasonably had for the same, without taking any sum of money by way of fine or income in respect of such lease. The special verdict finds that the rent reserved was the best rent which could be reasonably obtained, and that it was reserved payable half-yearly by equal portions on the 6th of April and the 11th of October in every year, except the last half-year's rent of the term, which was made payable on the 1st of August instead of the 11th of October. The verdict further finds, that no fine or income was taken, unless the reserving of the last half-year's rent in August instead of October amounts to the taking of a fine or income within the meaning of the power. It would, as it seems to me, be a palpable abuse of language to speak of the reservation of the last half-year's rent in August instead of October as to the taking of a sum of money by way of fine or income, when, in the first place, no sum of money whatever is taken, and, secondly, when the whole clause has reference prospectively to something to be done at the end of the term, and

not before its commencement. The only real question, therefore, is, whether the mode in which the rent is reserved is warranted by the power. Now all which the power requires is, that the rent should be the best rent which could be obtained, that it should be reserved yearly, and that it

* 430 should be payable during * the whole term. The jury have expressly found that the rent is the best rent which could be obtained; and the only points to be considered, therefore, are, whether it is a rent reserved yearly, and whether it is payable during the whole term.

It is clear, both on principle and authority, that a power to lease at a yearly rent is well complied with by the reservation of a rent payable half-yearly or quarterly. In other words, a rent does not cease to be a yearly rent, within the meaning of such a power, merely because it is made payable more than once a year. What is meant in such a power by the words "yearly rent" is, as I conceive, a rent payable in respect of each year of the tenancy, and payable in the year in respect of which it is reserved. Whether the rent be reserved on one or more days in the year, and whether it be made payable at the beginning, the middle, or the end of the year in respect of which it is reserved, it is still, as I conceive, a yearly rent, if it be payable on some ascertained day or days in every year, as the equivalent for the occupation during that year. If this be so, the rent in this case is certainly a "yearly rent:" and I think it equally clear that it is a rent payable during the continuance of the term; for though after the 1st of August in the last year of the tenancy no sum of money will be actually paid, yet rent is by the lease made payable in respect of that period as well as of the rest of the term; and this is all which, in my opinion, the power requires. It is, however, contended, that, even admitting the lease to be framed in a manner which amounts to a literal compliance with the terms of the power, yet it is bad, as being a fraud on what was contemplated, and as defeating the manifest intention of the testator to protect the interests of the re-

* 431 mainder-man; * for it is said, if the tenant for life should die in the last year of the term between the 1st of August and the 11th of October, then during that period

the remainder-man would have no right of possession, and yet he would be entitled to no rent by way of equivalent; and this, it is said, could not have been what the testator meant. But this argument appears to me to be founded altogether on a fallacy. It assumes that the testator must have intended to give a protection to the remainder-man, which, if the construction which I put on the words "yearly rent" is correct, he has not expressed. How are we to learn what benefits are intended for the remainder-man, otherwise than by looking to the language of the will? He takes merely as a volunteer, by the bounty of the testator. If the testator had desired that the rent should, under all circumstances, be made payable at the end of the year, he might have so provided. In the same way he might have stipulated that the rent should be made payable once a year or twice a year, and not oftener, so as to secure to the party entitled in remainder the year's rent or half-year's rent falling due next after the death of the tenant for life. This, however, he has not done. He has imposed on the tenant for life the necessity of reserving the best yearly rent during the whole term; but at what days it should be made payable, and whether once or oftener, he has left to his discretion, considering him probably as the person best able to decide what would be most expedient in regard to all such particulars, and knowing, as he must know, that if the rent reserved was the best rent which could be obtained, the interests of the remainder-man could not be really prejudiced.

In order to show that in construing this power it

* is necessary to look beyond the mere words in which * 432 it is framed, this extreme case was put in argument:

"If all which the power requires is, that a yearly rent should be reserved at some day in every year, then the power would be complied with by a reservation of the rent at the first day of every year, instead of the last,—a mode of letting manifestly injurious to the remainder-man, and which the testator could not have contemplated." The case thus suggested was urged in the nature of a *reductio ad absurdum*. No reasoning, it was contended, can be pressed in support of the present lease, which would not equally go to uphold a lease in which the

rent is made payable at the beginning instead of the end of every year. Such a lease could not have been contemplated by the testator, and therefore so neither can the present. But there does not appear to me to be any *reductio ad absurdum* in the case suggested. A lease in which each year's rent is reserved on the first day of the year would, I think, be a lease warranted by the power, provided that a jury could find what they have found in this case, but probably could not in the case suggested, that the rent so reserved was the best rent that could reasonably be obtained. I have alluded to this extreme case, for the purpose of making clear the ground on which my opinion proceeds; but in truth in the present case the mode in which the rent is reserved, so far from being injurious to the remainder-man, is evidently for his benefit, no less than for that of the tenant for life. It is true that in the highly improbable event that a person granting a twenty-one years' lease should happen to die within the two last months of the term, the loss suggested might occur;

but, on the other hand, in the far more probable event * 433 of the lessor dying at some earlier part * of the term, the remainder-man would have the benefit of the anticipated payment, and so acquire greater facility in obtaining the last half-year's rent.

It only remains to add that no decided case is at variance with the view which I have taken; and, on the contrary, there is authority in its support. In *Doe v. Giffard*, (a) the lease was held bad, not because the rent was payable before the last day of the year, but because it was not payable during the whole term. There was, in that case, one half year in respect of which no rent was payable to any one; the term was to last forty-two half years, and there were to be only forty-one half-yearly payments of rent, and this was clearly contrary to the express terms of the power. In *Doe v. Morse*, (b) Lord LYNTHURST states the true ground on which the lease in that case was held bad; namely, that the power required the rent to be made payable by half-yearly pay-

(a) Cited in 5 B. & Ald. 371.

(b) 2 Cr. & M. 247; and 4 Tyrw. 185.

ments, which must mean at equal half-yearly intervals, or, at all events, on days which by the custom of the country were treated as equal intervals; whereas it was in fact reserved at very unequal intervals, — the 1st of May and the 29th of September, — and no evidence was given to show that those days were by the custom of the country treated as half-yearly days of payment. In *Isherwood v. Oldknow*, (a) and *Doe v. Wilson*, (b) the leases were held to be good; and the *dictum* of Mr. Justice POWELL, in *Regina v. Weston*, (c) assented to by Lord HOLT, is express in favour of the present lease.

On the whole, therefore, I have to state, that in my opinion, both on principle and authority, the lease of the 14th of December, 1833, is valid.

* MR. JUSTICE MAULE. — My Lords, I am of opinion * 434 that the lease was a valid execution of the power. The power requires that upon every such lease there should be reserved and made payable, during the continuance thereof, the best improved yearly rent that could be reasonably had for the same; it further requires that there should be no fine, that there should be a clause of re-entry for non-payment of the rent, and that the lessor should execute a counterpart. The lease in question is for twenty-one years from the 11th of October, 1833, and the rent of 903*l.* is payable on the 6th of April and the 11th of October in every year, except the last half-year's rent, which is made payable on the 1st of August next before the determination of the said term. It is agreed that the power is well executed, if the last half-year's rent might be reserved payable on the 1st of August.

It is to be observed that this power, though it requires a yearly rent to be reserved and made payable during the term, does not point out any mode or term in which it is to be made payable; it has no such words as "by equal half-yearly payments," or "by yearly payments;" and in the absence of such words, it is well settled that a rent may be a yearly rent, though reserved payable half-yearly. It follows from

(a) 3 M. & Sel. 393.

(b) 5 B. & Ald. 363.

(c) Ld. Raym. 1198.

this that "yearly" means payable within each year; not payable at the end of a year; for if it had that meaning, a rent payable half-yearly would be only in part and not entirely a yearly rent, and therefore a bad execution of a power requiring a yearly rent. It has been contended, indeed, that as the last rent payable under this lease is before the end of the term, the rent is not payable during the continuance of the term; but I think that is a forced and unnatural construction of the power, the proper meaning of which

* 435 is, that * the rent shall be payable in every year during the continuance of the term; the words "during the continuance of the term" being used to exclude payments after the term. If it had said it should be "reserved and made payable on every 1st of August in every year during the said term," there would have been no doubt that a rent payable on that day would have been sufficient, though the term continued after the last payment. The present power has in effect said, that there shall be reserved and made payable, during the continuance of the said term, the best yearly rent, on such days as the lessor and lessee may agree upon; for as it does not in any way point out the days, it leaves it to the parties to suit themselves about it. It appears to me, therefore, that that power has been literally pursued, and when that is the case the execution is good, though some other mode might be suggested which would be more beneficial to the remainder-man, possibly with the exception of a case of fraud, which, however, it is not necessary to discuss, inasmuch as nothing of the kind can be here suggested.

There are cases, indeed, in which the power has not been complied with according to its terms; but it has been insisted that it was sufficiently executed, because the actual execution could not put the remainder-man in a worse situation than that in which he would have been if the terms of the leasing power had been pursued; and leases have been sustained on this ground. When such a ground has been taken in support of an execution not according to the terms of the power, it is a legitimate argument in support of the objection to the lease, that in some event the remainder-man would be worse

off than if the power had been pursued; but it is a fallacy to apply this *argument when the leasing *436 power has been pursued, and to insist that a lease is bad, though the power is pursued, because some other mode of execution, also within the power, would in some event have been more beneficial to the remainder-man; indeed, if such an argument could be sustained, in many cases, — for instance, in this, — a valid execution of a power would be impossible. The Court of Exchequer Chamber seems to have lost sight of this distinction, when it states the case of *Doe v. Morse* to be directly in point, and the leasing power in *Doe v. Morse* required that there should be reserved and continued payable during the continuance of the lease, by half-yearly payments, the best and most improved yearly rent, whereas in the present power nothing is said about the period of payment; and the lease in *Doe v. Morse* reserved the rent payable the 1st of May and the 29th of September; that is, at periods of five and seven months; that was held not to be rent payable by half-yearly payments; it was clear, therefore, that the power was not complied with in terms; and it being insisted that the remainder-man could not be prejudiced, and that therefore the lease might be sustained as a sufficient though informal execution, Mr. Baron BAYLEY, in answer to this argument, made use of the *dicta*, for which alone the case was cited by counsel in the Exchequer Chamber, and not as a case in point, as the Court seem to have considered it. But though this case is not in point, that put by Justice POWELL, in *Regina v. Weston*, and agreed to by Lord HOLT, is in point. In that case, the first of those learned Judges, desiring to illustrate the case in hand by something clear and indisputable, said that if a man had a power to make leases, reserving the ancient *yearly rent *437 annually, yet if it was reserved on a day before the year was up, as if the year ended at Christmas and it was reserved at Michaelmas, it would be well, pursuant to the power; to which Chief Justice HOLT agreed. As to the weight of such an argument, I refer your Lordships to what

Lord ABINGER observed when the case was cited in the Exchequer.

On the whole, therefore, I am of opinion that the lease was a valid execution of the power.

MR. JUSTICE COLTMAN. — My Lords, in answer to the question proposed by your Lordships, I humbly beg to state my opinion that the indenture of lease between P. M. Case and Margaret Rutland, as stated in the special verdict, is not a valid execution of the power of leasing, also stated in the special verdict, given by the will of Benoni Mallett.

It appears by the special verdict that the donees of the power are authorized by indenture under their hands and seals to demise for any term not exceeding twenty-one years in possession, so that upon every such lease there should be reserved and made payable during the continuance thereof the best improved yearly rent that could be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease; with other provisos not material to be considered. The lease was made on the 14th of December, 1833, for twenty-one years from the 11th of October preceding, yielding and paying the yearly rent of 903*l.* by equal half-yearly payments; that is to say, on the 6th of April and the 11th of October in every year, in equal portions, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st of August next before the determination of the said term.

* 438 * Now what is it that the power requires? It requires that the best yearly rent shall be reserved, and that it shall be reserved and made payable during the continuance of the term; and, on the best consideration I can give the subject, it appears to me that, in order to a compliance with the power, there ought to be, during the whole time that the term shall continue, rent growing due to the person who is entitled for the time being to the rents and profits of the land, so that no part of the time during which he is so entitled should be barren and unproductive to him. This view of the law is, I think, sanctioned by the opinion

of Mr. Justice BAYLEY, as it is to be collected from his judgment in the case of *Doe v. Morse*, (a) and such appears to me to be the view most conformable to the words of the power.

The case of *Isherwood v. Oldknow* (b) may appear at first sight in some degree at variance with the opinion above expressed, but I think on examination it will not appear to be so. There the power to make leases was for two or three lives, or for twenty-one years, so as there were reserved payable during the continuance thereof the best and most improved yearly rent which could be gotten for the same, without taking any sum of money for or in lieu of a fine or income for the same. A lease was made, under the power of the 15th of October, 1800, for fourteen years, to be computed, as to the meadow and plough lands, from the 13th of February then last, the pasture lands from the 25th of March then last, and as to the messuage from the 12th of May then last past, under a yearly rent of 100*l.*, payable by half-yearly payments on the 11th of November and the 25th of March; and this lease * was held good, although it * 439 was open to the objection that the term, as far as the house was concerned, had a continuance for a period of six weeks after the last rent-day. No objection was raised to the lease on this score; it being, I conceive, considered that, as the whole of the land was to be given up on or before the 25th of March, the term was to be looked upon substantially as not extending beyond that period, so that the reservation of the rent might reasonably be considered as coextensive with the continuance of the term.

This mode of viewing the term as expiring on the 25th of March, is analogous to what takes place with respect to the notice required to be given to a tenant from year to year, who has entered on different parts of the demised premises at different times. The law requires, in order to determine his tenancy, that half a year's notice should be given him, ending at the expiration of some year of his term; but it is always held a sufficient compliance with the rule if the six

(a) 2 Cr. & M. 247; 4 Tyrw. 185.

(b) 3 M. & Sel. 382.

months' notice is given with reference to the time of entry on the substantial part of the demised premises, for his year is considered as ending when his interest in the substantial part of the demised premises expires. *Doe v. Snowdon*, (a) *Doe v. Watkins*. (b) It may be proper here to notice a passage to be found in *The Queen v. Weston*, (c) where Mr. Justice POWELL is reported to have said, that if a man had a power to make leases, reserving the ancient yearly rent annually, yet if it were reserved upon a day before the year was up, as if the year ended at Christmas and it was reserved at Michaelmas, it would be well, pursuant to the statute; to

* 440 which Lord HOLT is said to *have agreed. The

opinion thus expressed by Justice POWELL having reference to a supposed case not very particularly stated, it is difficult to say how far it was intended to go. If he was contemplating a case in which an ancient rent was reserved upon the ancient and accustomed day of payment, it would be the same case with *Doe v. Wilson*. (d) There the power was to lease for twenty-one years, or any term of years determinable upon three lives, so as upon every such lease there were reserved and made payable during the continuance thereof the usual and accustomed yearly rents, boons, and services for the same. The lease was made on the 6th of January, to hold from that day for ninety-nine years, if three persons, therein named, should so long live, at a rent payable at Lady-day and Michaelmas in every year. It was objected to the lease, that the first payment, being to be made on the 25th of March, in little more than two months after the demise, was rather in the nature of a fine than rent, and the last payment, if the lives should last till the end of the term, being to be made on the 29th of September, whereas the lease would not expire till the 6th of January following, the rent could not be considered as having been made payable during the continuance of the term. But as it appeared from former leases of the demised premises that the 25th of March and the 29th of September were the usual and

(a) W. Blackst. 1224.

(b) 7 East, 551.

(c) Ld. Raym. 1198.

(d) 5 B. & Ald. 368.

accustomed rent-days, the Court were of opinion that the reservation of the rent was in conformity with the power. In that case, although by the terms of the power the rent was required to be reserved during the continuance of the term, yet it was the usual and accustomed yearly rent which was to be * reserved ; and the reference to the * 441 accustomed rent qualified the words of the power, which required a yearly rent to be reserved during the continuance of the term. This case, therefore, will not furnish a rule for construing the same words, where there is nothing in the context to indicate that they are used in any limited and restricted sense.

On these grounds, it seems to me that there has not been in this case a compliance with the requisites of the power ; and although the deviation is not a very important particular, great inconvenience would follow from introducing, without any necessity, laxity and uncertainty into a branch in which the provisions of the law may so easily be accurately complied with.

MR. JUSTICE COLERIDGE. — My Lords, the question upon which your Lordships have called for my opinion, turns upon the execution of a leasing power contained in a will, which, among other things, required that in every lease made under it there should be reserved and made payable during the continuance thereof respectively the best improved yearly rent that could be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases, and that there should be a clause of re-entry for non-payment of the rent. The lease in dispute was made on the 14th of December, to hold from the 11th of October preceding ; the rent was reserved payable on the 6th of April and 11th of October, except the last half-year's rent, which was reserved and agreed to be paid on the 1st of August preceding the determination of the term ; and it is upon this stipulation as to the last half-year's rent that the objection is founded.

* In order to a due construction of any leasing power, * 442 we are to be guided of course by the intention of him

who created it. In this inquiry it will, almost universally, happen that the intention is in part expressed ; in part to be collected by implication. With regard to the former, I am not aware that any difference of opinion as to the rule to be observed prevails. However unreasonable or unnecessarily minute it may be, it is an express condition which binds the party who acts under the power ; he can enter into no consideration of consequences ; he must obey it strictly ; and any substantial deviation, however desirable in itself upon a just consideration of all the circumstances, will vitiate the instrument on which it appears : this then is the first inquiry. The power in terms requires, that “ upon every such lease there should be reserved and made payable during the continuance thereof the best improved yearly rent that could be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease.” The objection to the lease seems to raise only two questions upon this : Has the rent been reserved and made payable during the continuance of the lease ? Has any sum been taken by way of fine or income in respect of the lease ? These questions will in fact resolve themselves into one, and they both involve an inquiry into the character which we are to ascribe to the payment which is to be made on the 1st of August in the last half-year of the term ; for it has been doubted whether that payment can properly be considered rent at all, and is not rather in the nature of a fine or income, or, at all events, a money payment not issuing out of the land, nor paid in return for the occupation thereof. On

the first view, an express prohibition in the power
 * 443 * would be disregarded ; in the last, the rent would not be reserved during the continuance of the term, but the occupation for a whole half-year would be rent-free. I cannot, however, acquiesce in either view ; it does not seem to me that this partial anticipation of the payment of one small portion of the rent at the very close of the term bears any resemblance in character to a fine or income ; it has no effect on the amount of rent annually reserved, nor can have been stipulated for with a view to the interest of the tenant for life, as opposed to that of the remainder-man. If it be

not a fine or income within the meaning of those terms as used in the power, it seems scarcely worth while to inquire whether it strictly fulfils the legal definition of the term, "rent," because we must construe that term as used in the power popularly, according to the manifest intention of the devisor; and yet it may be observed that it is clearly a return, annual in its nature, for the occupation of the lands, and that distress is incident to it. Certainly we have no right to require a closer agreement to rent, in the strictest sense, in all its essential qualities. In Rolle's Abridgement, title "Reservations," (a) it is said, if a man grant a future interest in land, as for certain years, to commence ten years after, he may reserve a rent upon this, payable presently; and Mr. Cruise (b) gives the reason: "for it will be a good contract to oblige the lessee and to ground an action of debt, and the lessor may have his remedy by distress for the arrears when the lessee comes into possession."

I come then to the question, — Has the rent been reserved and made payable during the continuance of the lease?

It is urged that to satisfy these words, *rent ought *444 to be accruing and issuing out of the land from day to day for every day so long as the term endures, and up to the last moment; but that, from the 1st of August to the 11th of October in the last year, if the rent be paid according to the stipulation of the lease, the land will become rent-free; no rent will be issuing from it; that the rent, therefore, is not reserved during the continuance of the term. It seems to me that the words "during the continuance of the lease" will more reasonably bear another meaning, and that the stipulation merely requires that the best improved yearly rent shall be reserved for every year of the term for the whole period of it, and that it should be made payable in every year during the continuance of the term; that is, neither before its commencement, which might make it a fine, nor after its termination, by which the security of distress for its payment at all might be lost. In this sense the lease satisfies the stipulation of the power; and I conclude, therefore, that the lease

(a) Vol. 2, p. 446.

(b) Dig. Vol. 3, p. 316 (3d ed.).

is a valid execution of the power, so far as regards the expressed intentions of the devisor in the creation of it.

But although there be no breach of any condition expressly imposed by the leasing power, I am still to inquire whether the lease satisfies all those that are implied in it, for I cannot agree that a merely literal compliance with the written terms of the power will suffice; the terms of the lease must be such as to satisfy the intention of the devisor, as that may be collected from the language he has used. It has been said that where there is a literal compliance with the power, the only proper inquiry remaining is, whether the lease is such as a prudent tenant in fee-simple would have made. Such

* 445 an inquiry might in * many instances lead to the same conclusion in fact as a more correct one; but, on the other hand, many circumstances might very reasonably induce a prudent owner of the fee to make such a lease as could contravene the intentions of the framer of such a power as that under consideration; it might be wise in him, for good consideration, to postpone or to anticipate the receipt of the profits. The tenant for life and the remainder-man, though their estates make up the whole fee, do not, in respect of interest in the profits, make up exactly the tenant in fee, for they have several, and, in many respects, opposite interests. The true criterion is the intention of the devisor. Now he intended that the tenant for life, in spite of the uncertainty of his interest in duration, should be able to grant a certain lease; that in this lease the rent should be so reserved as to make the tenant's occupation equally profitable in the way of render to the landlord for the time being throughout its whole duration; the rent, therefore, was not to be anticipated in the shape of fine or foregift, but to be reserved and made payable yearly during the continuance of the term. Thus far his intention is clear; but the very terms in which he has disclosed this intention show, also, that he was not anxious to provide for absolute certainty and unerring equality in the division of the profits between the tenant for life and the remainder-man, in case the former should die during the continuance of the term; that could only be secured by directing a reservation of the rent daily, and he makes no such

unreasonable stipulation; he does not even direct it to be reserved weekly, monthly, or quarterly; he uses the term yearly; and that permits a yearly, half-yearly, or quarterly reservation. Something, therefore, is necessarily left to what we call * chance during the whole twenty-one * 446 years; for the tenant for life may die soon after the commencement, or towards the close of a half-year, and his occupation for a short period may be profitable or not, accordingly. The deviser appears to have entered into no calculation on such minute points. It is said that his intention was, that in no event should the remainder-man's occupation be for any period of time barren. That could only be effected, consistently with a yearly reservation, by making it possible in a certain event for the occupation of the tenant for life to be barren for a considerable period; in other words, he would give the remainder-man a preference over the tenant for life. But what is the evidence of such intention? I cannot collect it from the words of the power or the circumstances which it must have contemplated.

It has been asked whether the whole last year's rent might have been reserved at the beginning of it. I am inclined to think that the spirit as well as the letter of the power would allow this; but I do not pronounce a decided opinion; it seems to me unnecessary to form one in order to answer your Lordships' question, for in a matter of this sort much will depend on degree; extreme cases, therefore, will not, as sometimes they will, test the soundness of an opinion. In this view I observe upon the fact that it is not the first half-year's rent, nor every half-year's rent, but only the last, of which the payment is anticipated. Whoever is to receive that payment will be benefited by the stipulation, because he thereby gains the power of distress with the crops on the ground; and at the original granting of the lease it was more probable that the remainder-man would be benefited than the tenant for life. Being, therefore, on the whole, of opinion that this lease has been framed in accordance * with * 447 the intention of the deviser, expressed and implied, I am of opinion that it is a valid execution of the power.

MR. JUSTICE WILLIAMS. — My Lords, the question in this case is, whether the lease is or is not made in conformity to the following leasing power : [The learned Judge read the power.] And in considering this question, I shall assume that the power is to be construed in the same manner and by the same rules that regulate Courts of Law in their interpretation of any other document or writing ; by which I mean, that any strictness or laxity, which may have been supposed to belong to the construction of instruments of this description, is alike inadmissible ; and that the true intent and meaning in this, as in other instances, are to be sought for in the terms of the instruments.

The lease in question bears date the 14th December, 1833, and is made between P. M. Case, the tenant for life under the will, and the plaintiff in error, whereby P. M. Case, in exercise of the power of leasing, demised to her, her executors, &c., the said tenements with the appurtenances, to hold the same from the 11th day of October then last, for and during the term of twenty-one years then next ensuing, yielding and paying therefor to the said P. M. Case and his assigns during such part of the term as he should live, and after his decease unto such other persons as for the time being should be entitled to the reversion of the same premises under the said will, the yearly rent of 903*l.*, by equal half-yearly payments, on the 6th April and the 11th October in every year, in equal portions, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st day

* 448 of August next * before the determination of the said term. Then follow some other provisions which it is not material to notice, the question arising upon the reservation of rent in the last year of the term. P. M. Case, the tenant for life, died on the 4th July, 1834, without issue, and the defendants in error, claiming title to the tenements under the said will, contend that the said lease is not a good execution of the power.

Now, upon adverting to the terms of this power, it is observable that the only limitation or restriction as to the reservation of rent is, “ that it should be the best improved yearly

rent that could be reasonably had for the same." Whether the rent should be made payable yearly, half-yearly, or quarterly, or at any other stated period, is not specified. To hold that any particular time in the year for the payment is required is, as it seems to me, to introduce a new term, and to add a further restriction, unless, indeed, the words "the best improved yearly rent" necessarily imply that it should be made payable at once, in one sum, the whole amount; that, however, is not, in my opinion, the fair interpretation. The plain and obvious meaning, I think, is, that the rent should "be reserved and made payable" during each year of the term, or, as the language of the *reddendum* in leases so usually is, "yielding and paying therefor yearly and every year during the continuance of the term" so much, whatever the amount of rent in the particular case may be. This, indeed, seems to be so clear that the citation of any authority in support of this construction may, perhaps, be superfluous. The point, however, has been brought expressly under the consideration of the Court of Queen's Bench, in the case of *Doe v. Wilson*. (a) There the language of the power * 449 was, "so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents," &c. The objection there was, that the rent was reserved half-yearly, whereas it was contended that the words of the condition contained in the leasing power could not be satisfied unless the rent reserved be payable once a year only; viz., at the end of the year after the making of the lease. Upon this point Lord C. J. ABBOTT said: "It is admitted that if the words of the power had been, 'so that there be reserved and made payable during the continuance thereof the usual and accustomed yearly rent,' without the word 'yearly' immediately following the word 'payable' (and in the case before your Lordships the word 'yearly' does not immediately follow the word 'payable'), a rent reserved half-yearly would have been sufficient; that is, that a payment by portions at the end of each half year, or at the end of each quarter of

(a) 5 B. & Ald. 363.

the year, does not prevent the rent from being, in the common understanding of mankind and in common parlance, a yearly rent. I cannot see any reason why the words 'payable yearly during the continuance thereof' should make any difference." He then adverts to the usual language of leases, and, observing that the Court ought to construe those words "payable yearly" with reference to that language, concludes against the validity of the objection; and in this view of the subject Justices BAYLEY and HOLROYD fully concurred.

But it is said, that even if the half-yearly payments be unobjectionable, the reservation of the rent on the 1st of August in the last half-year of the term is contrary to the power, and avoids the lease; and this objection, it * 450 was argued, is sustained, as well upon the * authority of decided cases, as also by the imperious effects necessarily produced by such reservation upon the party in remainder.

And upon the first point, if I had thought that the question had been already decided, that would have been with me a strong, if not sufficient, reason for holding the lease to be invalid; but I cannot consider that to be the case. The authorities alluded to are, *Doe v. Giffard*, cited in the case of *Doe v. Wilson*, (a) and *Doe v. Morse*. (b) In the case of *Doe v. Giffard*, the lease (made under a power of leasing for twenty-one years, reserving the best and most approved yearly rent) bore date the 14th September, 1809, and was, for the term of twenty-one years, the rent to be payable the 29th September and the 25th March, and the first payment to be made on the next 25th March. Lord ELLENBOROUGH is reported to have held the lease invalid. There, however, it is obvious that rent was not reserved during the whole term, for by the mode of reservation no rent was payable at all for the last half-year; but in the present instance no such objection exists, for the rent is reserved payable during the term, and for the last half-year as well as for every other, though not made payable at the end. In the

(a) 5 B. & Ald. 371.

(b) 2 Cr. & M. 247; 4 Tyrw. 185.

other case of *Doe v. Morse*, the power required the rent to be reserved half-yearly, and in the lease the rent was made payable on the 1st of May and the 29th of September. There was, therefore, a manifest departure from the direction in the power, and upon that the judgment of the learned Judges mainly depended. That of the Lord Chancellor (then Lord Chief Baron) proceeded upon that ground exclusively.

It is true that Mr. Baron BAYLEY does *intimate an * 451 opinion that the rent ought to have been made payable at the end of the year, upon which so much reliance has been placed; it is obvious, however, that the unequal division of the year is the circumstance chiefly relied upon by him, for he points out the disproportion by actually numbering the days, and showing that 151 days were allotted to one supposed half-year, and 214 to the other. The decision in that case, therefore, is clearly sustainable, without having recourse to any other consideration, upon the sure ground that the lease was not according to the plain and unambiguous language and meaning of the power. But it was further contended, that the lease is void from the injurious effect which the reservation of the last half-year's rent is calculated to produce upon the party entitled in remainder, inasmuch as if the tenant for life should die after the 1st of August and before the end of the year, there would be an occupation of the premises without any rent payable to those in remainder.

Upon this part of the case it seems to me, that unless the reservation of rent be upon the face of the lease itself inconsistent with the terms of the power, it is an unsafe and precarious rule of construction to make its validity to depend upon any other consideration. To ascertain the balance of advantage or disadvantage in each particular case may, and in many instances probably would be, at least as difficult as to discover the intent and meaning of the creator of the power, which, as I have already said, I take to be in every instance the true question. If, however, such inquiry into loss or benefit be admissible, I cannot help thinking that the advantage of being entitled to distrain for rent, if in arrear on the 1st of August, when the produce of the farm

* 452 is upon the ground, contrasted * with the right to distrain on the 11th of October, is at least equivalent to the contingent loss of rent upon the event which this objection supposes.

It is true that in the case of *Isherwood v. Oldknow*, (a) a lease (under a power requiring the reservation of rent "during the continuance of the term") wherein no rent was reserved during the last half-year of the term, was sustained. I do not wish, however, to place much reliance upon the decision in that case, because that particular objection does not appear to have been taken, and the attention of the Court was drawn to another, whether, the first half-year's rent having been made payable twenty-seven days after the execution of the lease, that in itself amounted substantially to a foregift prohibited by the power.

I rest my opinion upon the language and (as I think) the meaning of the power in this particular case, and the manner in which it has been executed; and seeing that the lease has been made "for a term or number of years not exceeding twenty-one," and that "the rent has been reserved and made payable during the continuance thereof," forasmuch as the last payment (which raises the objection) is, I think, clearly for the last half-year, though made before the end of it, and that such reservation (if that consideration ought to be entered into) is at least as beneficial to the party in remainder as if made at the end of the term, it seems to me that the power has been in the letter and spirit complied with, and that therefore the indenture of lease in this case has been duly executed.

MR. JUSTICE PATTESON. — My Lords, the single question is, whether the rent reserved payable on the 1st * 458 * of August in the last year of the term, which was to end on the 11th of October, can be said to be reserved and made payable during the continuance of the term, within the true meaning of the power under which the lease was made. No case exactly the same as this has been cited, nor

(a) 3 M. & Sel. 382.

does any such appear to exist in those which have been cited. Objection was taken to the reservation of the rent from the beginning to the end of the term ; whereas here it is admitted that the proper rent is reserved, and at the proper times, until the last half-year's rent. The reason for this reservation is said to be, that the lessor may have an opportunity of distraining for the last half-year's rent, if necessary, and in that respect it is beneficial to the landlord for the time being, equally whether he be the tenant for life or the remainder-man ; on the other hand, it is obvious that if the tenant for life should happen to die between the 1st of August and the 11th of October in the last year, the remainder-man would succeed to an unproductive estate until the 11th of October, and would be to some extent injured. The improbability of such an event, and the apparent reason for the reservation, seem to have been taken into consideration in the Court of Exchequer, but not so in the Court of Exchequer Chamber, where the objection appears to have been treated as being the same as would have arisen if a beforehand rent had been reserved from the beginning of the term.

I will first consider the case upon the latter supposition. It appears to me that the person who created the power intended that the person exercising it should take no exclusive benefit for himself to the prejudice of the remainder-man, but should reserve the best yearly rent during the continuance of the term : by which word " rent," I understand a compensation for the * actual occupation ; not a sum * 454 of money covenanted to be paid by anticipation in respect of a future occupation, which a beforehand rent in truth is. Such a reservation, namely, a sum of money to be paid at the beginning of the term as for the first year's rent, and so at the beginning of each succeeding year as for that year's rent, must be prejudicial to the remainder-man, at whatever time the tenant for life may happen to die, unless, indeed, he should die on the very last day of the year. Independent of authorities, therefore, I should consider that a lease stipulating for the payment of such sum of money at the beginning of a year by anticipation did not reserve rent at all, and certainly that it did not reserve rent made payable

during the continuance of the year. The case of *Doe v. Morse* (a) seems to me to be an authority for such view of the question. It is true that the question there was, whether the rent was reserved half-yearly; but as it was reserved in two payments in respect of the intended occupation for two half-years, and the second payment was to be after the expiration of the first half-year, I cannot see why it should have been held a bad reservation upon any other ground than that a beforehand reservation is bad. What fell from Mr. Justice POWELL, in *Regina v. Weston*, (b) was by way of illustration of the question in that case, and is not entitled to the same weight as if it had related to the point actually before the Court; and what was said by Lord ELLENBOROUGH, in *Isherwood v. Oldknow*, (c) when taken, as it must be, with the context, is nothing like a decision upon this point. The case of *Isherwood v. Oldknow* turned on a totally different matter;

namely, that the first payment of rent as for half a
 * 455 * year, although payable in a short time after the execution and date of the lease, was in truth for half a year, because the holding was made to be from a bygone day, and the tenant had occupied during the interval. The case of *Doe v. Wilson* (d) was decided on the ground that the rent was reserved at the usual and accustomed times, according to the power, and in no way trenched upon the authority of *Doe v. Giffard*, (e) there cited; but I do not consider the last-mentioned case to be any direct authority upon the present occasion, inasmuch as there was in that case an actual loss of rent for a whole half-year.

For these reasons I am of opinion that, under such a power as that contained in the lease now in question, it was not competent to the person executing that power to reserve what is commonly called a beforehand rent. The only difficulty that I feel is in determining whether it makes any difference that the reservation is here confined to the last half-year's rent. I see fully that such reservation may be, and probably is, beneficial generally, and that it is highly im-

(a) 2 Cr. & M. 247; 4 Tyrw. 185.

(b) Ld. Raym. 1189.

(c) 3 M. & Sel. 893.

(d) 5 B. & Ald. 363.

(e) 5 B. & Ald. 371.

probable that the remainder-man should be prejudiced by it ; but still it is a stipulation for the payment of a sum of money in anticipation of a future occupation for the residue of the half-year, and therefore, according to my view of the effect of such a stipulation, I cannot say that it is a reservation of rent during the continuance of that half-year, but am obliged to say that there is a portion of the term during which there is no reservation of rent.

I am therefore of opinion that the indenture of lease stated in the special verdict, to which your Lordships' question refers, is not a valid execution of the power of leasing, as also there stated.

* MR. BARON PARKE. — My Lords, in answer to the * 456 question proposed by your Lordships, I have to state my humble opinion that the lease stated in the special verdict is a valid execution of the power of leasing, also stated in the special verdict. In order to decide this question the proper course undoubtedly is, to ascertain in the first instance what the intention of the donor of the power was, by the ordinary rules of construction applied to the instrument containing it ; and the lease must accord in all respects with that intention so ascertained, or it will be void.

Where the language of the power is restricted, and contains precise conditions which can be complied with in one way only, that way must be exactly followed. When the power uses general terms, and may be exercised in more ways than one, then the donee of the power must necessarily have a discretion ; and if there be any restriction upon that discretion, where none is expressed by the donor of the power, the only restriction that can be required is, that such discretion should be fairly executed, and at the very utmost that it should be executed in a reasonable manner ; and upon that principle the decision of this House proceeded, in *Smith v. Lord Jersey*. (a) If, indeed, it could be shown that expressions apparently of a general nature, and allowing a certain latitude of discretion, have, by a course of legal decisions, received a limited construction, then undoubtedly they must

(a) 3 Bligh, 290; 2 B. & B. 473.

be so construed, and it would be intended that the donor of the power used the words in that limited sense ; but such will be found not to be the case with reference to the general expressions used in this case.

Whether, when a latitude is left by the terms of the power to the donee, any thing more is required than the

* 457 * exercise of his discretion honestly and without fraud, is a question into which I need not inquire. It will be sufficient for the present purpose to assume that when there is such a latitude it must not only be fairly and honestly executed, but in a reasonable manner. Proceeding upon that assumption, if we apply these rules to the words of the power, we find that the testator has made express conditions that the lease should not exceed twenty-one years ; that it should be in possession, and not in reversion ; that the best improved yearly rent that can be reasonably had shall be reserved and made payable during the continuance of the term ; that there should be no fine or income ; and that the lessee should not be made dispunishable of waste by express words, and should execute a counterpart. All these conditions must be strictly complied with, for they are expressed, and no latitude is allowed to the donee of the power. These have been complied with in this case ; for the provision in the lease, that the tenant should have the barns, &c., for the purpose of thrashing, and until the 1st of August after the expiration of the term, is by way of covenant merely, and no question has been made on this ground at your Lordships' bar ; but the testator, besides these conditions, has required that there should be a clause of re-entry, in that respect leaving a latitude to the donee of the power. There is a clause of re-entry in the lease, if the rent or any part should be unpaid for forty-two days ; and the only question as to this part of the case is, whether this clause is a reasonable clause. That it has not been unfairly inserted is clear. I think it is a reasonable clause, sufficient to secure the due payment of the rent, which is the object of its insertion ; and there is a

* 458 case, *Jones v. Verney*, (a) in * which there was a

(a) Willes's Rep. 169.

clause of re-entry on the rent being unpaid for the same period of time, to which no objection was taken on the ground that it was a non-compliance with the terms of a power requiring a condition of re-entry on non-payment of rent to be inserted in the lease. Indeed, this objection was not insisted upon at your Lordships' bar, on the part of the lessor of the plaintiff, though taken in the Court below.

The principal ground of objection was as to the mode in which the rent was reserved in the lease. The lease was executed on the 14th December, 1833, and was to hold from the 11th October then last, at a rent payable half-yearly on the 6th April and 11th October in each year, except the last half-year's rent, which was to be paid on the 1st of August. It was not contended that the reservation of half a year's rent on the 6th of April was bad, though half a year would not then have elapsed, the case of *Isherwood v. Oldknow* (a) having settled that point; but it was strongly urged that the donee of the power had no right to reserve any part of the rent by anticipation, and that the rent must be so reserved as that no part of the estate belonging to the remainder-man could be occupied by the lessee without paying for it, and that any other mode of reservation would be an unreasonable execution of the power, and therefore void.

The main question in this case is, whether this principle of construction is correctly laid down; which must depend upon the authorities as to the construction of similar powers, with reference to the reservation of rent. In the absence of all authorities on this subject, I should say that the donor of the power, * having imposed no restriction as to the * 459 time of reservation for the protection of the remainder-man, left the donee of the power to exercise his discretion therein; and if so, that he might reserve it yearly, half-yearly, quarterly, or oftener, as he thought proper, and payable at the beginning or end of each year, half-year, or quarter; an opinion which is countenanced by that of Lord HOLT and Mr. Justice POWELL, in *Regina v. Weston*. (b) It is not necessary, however, to go so far; but, proceeding on

(a) 3 M. & Sel. 382.

(b) Ld. Raym. 1198.

the assumption that the reservation, to be good, must be both fairly made and reasonably made, it is impossible to say that the reservation in this case was a non-compliance with the power, even supposing that the tenant for life was bound to look only to the interest of the remainder-man. It is true that if the tenant for life had died in the last year of the term between the 1st of August and 11th of October, the remainder-man would have lost the half-year's rent. On the other hand, if the tenant for life died at any other part of the term, which is a much more probable event, the remainder-man would, in the first place, gain by the earlier payment of the last half-year (unless, indeed, we are to suppose that the rent would have been a little more if it had been made payable at the end of the half-year, as the times of payment may affect the amount of the rent paid); and, in the second place, he would gain by having the certainty of securing the last half-year's rent by the crops and produce of the farm; for if it had been reserved payable on the last day, the tenant might have removed all his crops and effects from

the farm before the rent became due; and as there
 * 460 would be no * power by law to distrain on the crops and effects so removed, he would be left to his personal remedy against the lessee. This is the reason why the last half-year's rent was made payable before the end of the term, and it is impossible to say that it is not a reasonable and even wise provision, if the interests of the remainder-man alone are to be considered. Can any one say that he would not have approved of such a reservation if he had been consulted by the tenant for life when the lease was prepared?

I therefore conclude that this reservation is fair and reasonable, and therefore good, unless it could be shown that that principle is not to be adopted in this case, and that the authorities have established the different rule of construction contended for; that is, that no reservation can be good which permits an occupation of any part of the remainder-man's estate, without remuneration to him; treating the rent as a mode of payment, the purchase-money of the term from the tenant for life and the remainder-man together, which ought, it is contended, to be paid in the proper proportions to each.

Upon the principle of the supposed rule, strict justice could not be done to both parties without reserving a rent payable at the shortest intervals of time, nor to the remainder-man without reserving a larger rent for the summer or more productive than for the winter or less productive half-year, so that he may have adequate compensation; but in truth no such principle is to be found in any of the decided cases on which reliance was placed, whatever colour may be given for the argument in the *dicta* and expressions of some of the Judges. In *Doe v. Giffard*, (a) where, * under a * 461 power to lease reserving the best yearly rent, a lease, dated the 14th September, for twenty-one years from the date, reserving rent upon every 25th March and 29th September during the term, the first payment to be made on 25th March next, was held void, — there was half a year for which no rent was reserved at all. Forty-one half-yearly payments would be to be made for a twenty-one years' lease. In *Doe v. Morse* (b) the power required half-yearly payments, and the Court construed the power as if it had been by even and equal half-yearly payments, or payments for even and equal half-years; the year to be, as near as may be, equally divided. The principle contended for, that if any part of the estate of the remainder-man is to be held under any circumstances without rent, the lease is necessarily void, is not the ground of that decision. There are some expressions, indeed, used by the Judges, particularly by Baron BAYLEY, which give some countenance to the argument in support of that doctrine, but no more; they are unnecessary to the decision of the case, on the very ground on which he puts it, and it by no means follows that he would have made use of similar observations in a case where the remainder-man may have a benefit by the reservation of the rent before the end of the term; and the principle of decision laid down by the learned Judge, and on which he professes to proceed, is, after all, that the requisites of the power must be substantially and honestly complied with.

(a) Cited in 5 B. & Ald. 371.

(b) 4 Tyrw. 185; 2 Cr. & M. 247.

As there is, therefore, no authority for the position that, on such a reservation as this, a lease is necessarily void if there be any part of the estate of the remainder-man which
 * 462 may be occupied without payment * of rent, I am of opinion that, as this reservation is fair and reasonable, the lease is valid.

My brother ALDERSON, who was not in the Court of Exchequer when this case was decided, but who heard the argument at your Lordship's bar, desired me to say that, at the close of the argument, he was of opinion that this was a due execution of the power.

LORD CHIEF JUSTICE TINDAL. — My Lords, in answer to your Lordships' question in this case, I humbly offer as my opinion, that the indenture of lease, as stated in the special verdict, is not a valid execution of the power of leasing given by Benoni Mallett.

The power of leasing is given with this restriction (amongst others), "so as upon every such lease there be reserved and made payable during the continuance thereof, the best improved yearly rent;" and by the *reddendum* in the lease made under this power, the yearly rent is made payable "by equal half-yearly payments, on the 6th of April and the 11th of October in every year, in equal portions, except the last half-year's rent, which is hereby reserved and agreed to be paid on the 1st day of August next before the determination of the said term;" and it appears to me that the reservation under which the last half-year's rent is made payable two months and eleven days before the expiration of the last half-year, is no compliance with the terms of the leasing power, "that the rent shall be reserved and made payable during the continuance of the term." The restrictions of the exercise of a power are imposed for the protection of the remainder-man, — not of the tenant for life; and the restriction in the lease "to a rent reserved and made payable during the continuance of the term," is essential for the effectual prevention
 * 463 ing of the tenant for * life from making any portion of the rent payable by anticipation, and appears to me to have been intended for that very purpose; for if the rent for

any given portion of the year is made payable by the terms of the lease before the expiration of such portion of the year, no part of such rent can be said to arise or grow, or to be a continuing rent during the remainder of that portion of the year after such payment has been actually made, and there is nothing but a dry occupation by the lessee, without rent for the residue of such portion of the year. There is, therefore, as it appears to me, in this case a direct breach of the leasing power; a breach which is in favour of the tenant for life, and consequently averse to the interests of the remainder-man; for if the tenant for life chances to die after the 1st of August in the last year, and before the end of the term, he has already received the whole of that half-year's rent; or, if not, it would go to his executors; whereas the whole half-year ought to belong to and become the property of the remainder-man, under the usual form of reservation; and although it is said the reservation of the last half-year's rent before the last day of the term is equally beneficial to the remainder-man and the tenant for life, inasmuch as it gives the remainder-man a power of distraining for the rent, which he could not do after the expiration of the term, yet this is but a small benefit to the remainder-man, who would have all his remedies against the lessee for the last half-year's rent, except that by distress, if the rent be made payable in the ordinary form on the last day; whereas he incurs the certain loss of the whole half-year's rent, if the tenant for life dies as above supposed; and I would cite the words of

Mr. Baron *BAYLEY in *Doe v. Morse* (a), — which * 464 case appears to me to agree in point with the present:

“It is said that these reservations may turn out for the benefit of the remainder-man; but the language of the power is to be regarded, and the tenant for life is not to throw on the remainder-man, without his sanction, the uncertainty of the chances which may turn out to his prejudice.” It is obvious that under this mode of reservation, the lessee might occupy after the death of the tenant for life, without paying any rent

(a) 4 Tyrw. 189; 2 Cr. & M. 247.

to the remainder-man, which never could have been intended by the donor of the power to lease.

And if such exercise of the power be, as I conceive it is, against the meaning of the power itself, so also the weight of the authorities is against holding this to be a good execution of the leasing power. The case of *Isherwood v. Oldknow*, (a) which was relied upon in support of the validity of the execution of this power, does not, when considered, show it to be good. It is true, the objection to the lease under a similar power with the present, was in that case, that it reserved the first half-year's rent on the 11th of November, whilst the lease itself was only dated on the 15th of October, and the lease was, notwithstanding, held good, but all the Judges rested their opinion on the ground that it appeared on the record that the first half-year's rent was reserved, not by way of anticipation of the rent under that lease, but for the bygone occupation of the premises by the same tenant before the commencement of the lease; not for the occupation under the

lease; so that, as they said, there was no fraud on the * 465 power. The case of *Doe v. * Morse* cannot be distinguished in principle from the present, and appears to me to be an authority against the validity of the lease now under consideration. That lease was held bad, because the power directed the rent to be reserved payable half-yearly, and the lease reserved the rent payable at intervals which did not correspond with the usual half-yearly days for payment of rent. Every observation made by Mr. Baron BAYLEY shows strongly what his opinion would have been on the present case, besides the observation to which I have already referred. "The tenant for life," he observes, "gets a year's rent for less than nine months' occupation. That may be for his own benefit, but by it he deprives the remainder-man of some of the chances he might have had of receiving a portion of the rent, had it been made payable at the end of the year." The case of *Doe v. Wilson* (b) is no authority in support of the validity of the execution of the power now under consid-

(a) 3 M. & Sel. 382.

(b) 5 B. & Ald. 363.

eration ; for although one objection there taken was, that the rent reserved was made payable at an earlier day than it would have been payable if made payable at the end of each year, yet that reservation was held good solely by referring to former leases of the same premises, in which it had been made payable on the same days ; so that the Court held the usual and accustomed rent to have been reserved, payable in the usual and accustomed manner ; whereas in the present case there was no evidence whatever, either of the terms of former leases, or of the present mode of reservation of the last half-year's rent, being agreeable to the custom observed in that part of the country where the lands lie, even if such evidence would have * been admissible. And * 466 as to the *dictum* of Mr. Justice POWELL in *Regina v.*

Weston (a), (to which it is said by the reporter that HOLT, C. J. agreed), viz. " that if a man had a power to make leases, reserving the ancient rent annually, yet if it were reserved upon a day before the year was out, as if the year ended at Christmas and it was reserved at Michaelmas, it would be well, pursuant to the power ; " I think it improper to give to this *dictum*, which was merely used as an illustration, the force of a well-considered decision. It was quite uncalled for ; no argument heard upon it ; no authority cited in its support.

Upon the whole, therefore, I think the weight of the authorities agrees with the reasonable interpretation of the terms of the will creating the power, in support of the opinion which I offer to your Lordships, that the lease is not a valid execution of the power.

August 18.

THE LORD CHANCELLOR. — The question in this case is, whether the lease, as stated in the special verdict, was a valid execution of the leasing power given by the will of Benoni Mallett. It was one of the restrictions upon the power, that upon every lease there should be reserved and made payable during the continuance thereof, the best im-

(a) Ld. Raym. 1189.

proved yearly rent that could be reasonably had for the same, without taking any sum of money by way of fine or income for or in respect of such lease. The lease was made on the 14th of December, 1833, for twenty-one years from the 11th of October preceding, at the yearly rent of 90*3*l., payable by

equal half-yearly payments ; viz., on the 6th of April * 467 and the 11th of October, in every year, * in equal portions, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st of August next before the end of the term. It is admitted that the power was well executed, if the last half-year's rent might, consistently with the restrictions on the power, be made payable on the 1st of August.

The power requires a yearly rent to be reserved. It is clear that, under and consistently with this power, which says nothing as to the time of payment, the yearly rent might have been reserved and made payable yearly, half-yearly, or quarterly ; and I agree with what was said by one of the learned Judges, that it follows as a consequence that a yearly rent means a rent payable within each year, not payable merely at the end of the year ; and the reservation, therefore, in the last year, of the rent on the 1st of August, if made *bonâ fide*, which is not controverted in the present instance, was within and a due execution of the power. But it has been contended, that as the yearly rent was to be reserved and made payable during the continuance of the term, and as the last payment was, by the provision in the lease, to be made on the 1st of August, upwards of two months before its expiration, it was not payable during the continuance, that is, the whole continuance of the lease, and so was at variance with the power. But this depends upon what is meant by a yearly rent reserved and made payable during the continuance of the lease. These words, I think, obviously import nothing more than this, that in every year, as long as the lease shall endure, a yearly rent shall be reserved and made payable. If this be the true interpretation of the

power, it is clear there has been no infringement of the * 468 restriction. The evident motive for fixing * upon a day for payment, before the last day of the term, was to

ensure the right of distress for the benefit of the person, whoever he might be, that should at that period be entitled to the rent.

The opinion of Justice POWELL, in *Regina v. Weston*, though mentioned merely by way of illustration, and in which Chief Justice HOLT concurred, is entitled to much attention. It is expressly in point, and coincides with the view I have taken of this question. On these grounds, therefore, I recommend to your Lordships to reverse the judgment of the Court of Exchequer Chamber.

LORD BROUGHAM. — In this case I had not an opportunity of doing more than considering the opinions of the learned Judges, with the majority of whom, as at present advised, I concur; but not having heard the whole of the arguments, having been obliged to be at the judicial committee of the privy council, I shall do no more than say that I entirely agree in the view taken of this case by my noble and learned friend.

LORD CAMPBELL. — I was present during the whole of the argument, and, as my duty required, very attentively listened to what was urged on both sides, and I have since most carefully perused the opinions of the learned Judges, and have arrived at the same conclusion with my noble and learned friend, that the judgment of the Exchequer Chamber ought to be reversed. I entirely approve of the judgment of the Court in which the action was brought. It seems to me that the meaning of the condition imposed by this leasing power was merely that the rent should be reserved in respect of the whole of the * term, and should be pay- * 469
able during that term; and if those two requisites were observed, there was nothing unreasonable in the mode in which the power was exercised with a view to the benefit of the estate, and the lease would be valid. Now it is clear that a rent was reserved in respect of the whole term; because, although the last half-year's rent was to be paid on the 1st of August, it was with reference to the period at which the term ended. It was payable within the term,

because it was payable on the 1st of August, a day prior to the expiration of the term. Then was not it a reasonable execution of the power?

A question was put to the counsel at the bar, whether, if the rent had been reserved on the first day of every year, that would have been a good execution of the power. That might be very doubtful; because it is quite clear that if such a condition were imposed upon the tenant, he would not give by any means so good a rent as he would if allowed to occupy for the year, and to cultivate the farm, and to receive the profits of the farm six months before any rent was payable; and I do not know whether that would be at all consistent with the good management of the estate: I think, on that ground, that to have made the rent payable on the first day of the year would not have been a reasonable reservation. But when you see that every half-year's rent was made payable at the expiration of the half-year, until we come to the last half-year's rent, and that that was reserved payable on the 1st of August, for the reason that there might be a distress when the crops were on the ground, so as to enforce the payment, it was clearly for the benefit of the estate; and whether the tenant for life or the remainder-man might take advantage of it, it seems to me an entire compliance

* 470 * with the power of leasing contained in the will.

There is no reason to suppose that the testator looked peculiarly to the benefit either of the tenant for life or of the remainder-man; his anxiety was, that a lease should be executed which should be consistent with a reasonable management of the estate, and for the benefit of the person who was in the occupation of the estate, whoever he might be. There was here just as good a chance that it might be for the benefit of the remainder-man as for the benefit of the tenant for life. Therefore, upon reason and upon principle, I have no doubt that the power was well executed.

I am happy to think, that although there was a *dictum* of Mr. Justice BAYLEY referred to, which is not very express or directly in point, and which may be explained away; yet, on the other hand, — I am sure I speak with the most sincere respect for Mr. Justice BAYLEY, — if I am to weigh his au-

thority against that of Mr. Justice POWELL, confirmed by Lord HOLT, I must say that his authority does not amount to an equipoise ; and then if we look at principle, I think upon principle it seems to me, with great respect for the opinion of the dissenting Judges, that this was clearly a good execution of the power of leasing.

It was then ordered and adjudged by the Lords, &c., that the judgment given in the Court of Exchequer Chamber, reversing the judgment of the Court of Exchequer, be reversed : and it was further ordered and adjudged that the original judgment of the Court of Exchequer be affirmed.

* ROBSON v. ATTORNEY-GENERAL. * 471

1842.

JOHN ROBSON and CATHERINE his Wife, and } *Appellants.*
 JOHN AINSLEY and ISABELLA his Wife . . }
 HER MAJESTY'S ATTORNEY-GENERAL . . . *Respondent.*

*Residuary Fund. Right of the Crown. Issue ; new Trial.
 Evidence. Pedigree.*

The residuary estate of a testator, who died in 1785, was paid into the exchequer in 1794, under a decree in an administration suit, establishing the right of the Crown thereto, for want of heirs or next of kin of the testator. Parties claiming title to the fund in both characters in 1825 were permitted to go before the Master, for the purpose of making out their claim. In support of their title they produced a narrative in the handwriting of J. T. (found in his repositories at his death in 1792, not made public in his lifetime), containing a genealogical account of his family, of which it represented the testator to have been a member ; it purported to be founded chiefly on hearsay, and not to be perfect, and it was erroneous in many particulars. The testator, in his will, declared that he had no living relation, and that J. T., to whom he left a legacy, was not a relation. The narrative was admitted in evidence upon the trial of an issue, directed by the Court of Chancery, to ascertain whether the claimants were

next of kin of the testator. The verdict being against them, the Court refused a new trial.

The House of Lords affirmed that judgment, and disposed of the claimants' case on the merits, on the ground that they had no material new evidence to give, and that the narrative, taken in conjunction with the testator's will, negatived their title.

Quære, whether the narrative was legally admissible in evidence in Courts of Equity.

Semble, the Courts lean strongly towards applications for further investigation in cases in which property falls to the Crown ; as that generally happens not from want of next of kin, but from failure of legal evidence of their title.

June 27; July 4, 1842. August 18, 1843.

SAMUEL TROUTBACK, a merchant, residing at Madras, in the East Indies, being entitled to some real estate there, and to a large personal estate, made his will, dated the 21st * 472 of July, 1780 ; and thereby — after * reciting, “ as I have no relation or kindred alive, to my knowledge or belief, having outlived them all, my son George and my late dear beloved wife being the last deceased ” — he bequeathed the sum of five gold star pagodas to every person demanding in person the same, at Fort St. George, Madras, of his trustees, within the space of three years after his decease, and who should by proper vouchers and certificates prove themselves to be lawful sons of any person surnamed Troutback, and born natives of England, but not otherwise. He also gave unto Mr. John Troutbeck, surgeon, late of the ship *Speke*, in the East India Company's service, the sum of five gold star pagodas, provided he demanded the same of his trustees, at Fort St. George, in person, within three years after the testator's decease, and not otherwise, as a person nearly of the same name with Troutback, though he solemnly believed and declared that the said John Troutbeck was not in any way related to him, or of the same family and kindred with him, and he disclaimed all relationship with him. The will then, after some directions as to the emancipation of the testator's slaves, proceeded as follows : —

“ Whereas it is natural for all men to have a regard for their native place and where the seeds of their education were first planted and imbibed, and more especially when

they have no kindred or relations alive or in being, which is the case with me, who came on shore naked and shipwreckt, in India, at same time I lost my only brother, who was drowned ; but it having pleased God to cloath me and prosper my honest endeavours, and to raise me in the East Indies, I do therefore order, direct, and bequeath all and every my real and personal estate " (subject always to all legacies bequeathed by the said will) " in the * following man- * 473 ner: to wit, it being my real intention to make the under-mentioned additional poor orphan foundation or charity school in St. John parish, in Wapping, near the Tower of London, &c., my principal legatee, under the direction of trustees and overseers hereafter named, only on the following terms and conditions: I do give and bequeath a sum, not exceeding the sum of 2000*l.* sterling, to erect and build either an additional wing or a separate new building adjoining or near the public charity-school built and standing near St. John's Chapel, in Wapping, &c., being the school where I got my first education, but not boarded at, in the years 1706-7 and 8, and during the tutorship of my godfather, the late Samuel Jefferies, gentleman, the head schoolmaster; which said intended new building shall be named and called ' Troutback's Poor Orphan Hospital or Bluecoat School,' for ever, and used and employed as a public charity-school for the benefit of poor boys, orphans or poor widows' sons in particular; and in default of such poor boys, orphans or poor widows' sons, born in that parish of St. John's, Wapping, and above the age of six years and within the age of eight years, the said Poor Orphan Hospital and Bluecoat School shall be for the use and benefit of poor tradesmen or other decayed and poor inhabitants' sons, who have resided in St. John's, Wapping, parish, upwards of seven years, and whose sons are within the age of eight years and above the age of six years; all the poor boys entitled to the benefit of the charity to be called ' Troutback's Orphan Scholars and Hospital Boys.' "

The will then proceeded to give particular directions — all benevolent and wise — as to the mode in which the hospital and school should be carried on, * and the * 474

eventual apprenticing of such of the boys as should be selected for that purpose into the sea or pilot service of the East India Company, — under whose protection “Providence has prospered my honest endeavours in the East Indies, during my residence there now near sixty years.” Among the clauses which concerned the arrangements of the school, there was a gift of a sum, not exceeding 700*l.*, for the purchasing, erecting, and building an organ and gallery in St. John’s Chapel, in Wapping, adjacent to the intended hospital, on the front of which organ the following words were to be cut and gilt: “The gift of Samuel Troutback, merchant, born in this parish, *Anno Domini* 1700.” For the purpose of carrying into effect the directions of his will with regard to the proposed foundation, the testator nominated and appointed a numerous committee of trustees, guardians, and overseers, who, with his executors in England, were to see his will performed; thirteen of whom, or more, were thereby authorized and ordained to form themselves into a committee, and to incorporate themselves and their successors for ever, by the name of “The trustees, guardians, and overseers of Troutback’s Orphan Hospital, Wapping,” with powers to purchase land in England, to sue and be sued, and with other powers of a similar nature. The will also appointed Thomas Pelling, the Hon. Edward Monckton, and two other persons, during the time they should remain in the East Indies only, trustees, guardians, and administrators of all the testator’s estate. There was no express gift of his residuary property, real or personal.

The testator, by an undated codicil, appointed George Lord Macartney, the Hon. Edward Monckton, Edward Cotsford, Esq., Claude Russell, Esq., Thomas * Pelling, Esq., and the Governor of Madras for the time being, executors of his will. By the codicil also he gave several legacies, but not of large amount, and he did not in any degree vary the directions contained in the will as to the foundation and management of the hospital and school, or make any disposition of his residuary property.

The said Samuel Troutback died in India in July, 1785,

and his will and codicil were on the 7th of October in the same year proved by Thomas Pelling, one of the executors, in the Mayor's Court at Madras. In May, 1788, the Hon. Edw. Monckton and Edw. Cotsford, Esq., two of the executors named in the will and codicil, proved those instruments in the Prerogative Court of Canterbury; and in 1792, they and others of the trustees named in the will filed a bill in the Court of Chancery in England, for the purpose of carrying into execution the trusts thereof, under the direction of the Court. The defendants to the bill were his Majesty's Attorney-General, the Rev. Dr. Francis Willis, rector of the parish of St. John's, Wapping, and the then Earl of Sefton.

By the decree made on the hearing of the cause, on the 18th of November, 1794, it was referred to the Master to take accounts of the real and personal estate of the testator, and of his debts, funeral expenses, and legacies, other than the charitable legacies in the will mentioned; and it was ordered that the personal estate should be applied in payment of the debts and legacies except as aforesaid, and as to the clear residue of the personal estate, that such parts thereof as were then invested in government securities should be transferred to the accountant-general of the Court; and that such parts *thereof as were not then invested should be *476 paid into the bank, and laid out in the purchase of bank 3 per cent annuities, in the name of the accountant-general, in trust in the cause. And it was further ordered that the Master should inquire who was the heir-at-law and next of kin of the testator; and in order thereto should cause advertisements to be published in the London Gazette and public papers as he should think fit, &c.

The Master by his report, dated the 29th of July, 1813, found that the testator's whole estate and property was in the East Indies; and that Mr. Pelling, the executor residing at Madras, entered into possession thereof, and remitted to the plaintiffs, Monckton and Cotsford, bills on the East India Company, on account of the moneys received by him; and that after paying expenses and certain legacies, the moneys paid into the bank by Monckton and Cotsford had been laid

out in bank 3 per cent annuities, in the name of the accountant-general, in whose name there was then standing on the credit of the cause, in that stock, the sum of 111,264*l.* 2*s.* 7*d.*, part of which arose from the testator's real estate. And the Master certified that no person had come in before him to prove any debt or claim any legacy; and that a claim had been brought in before him by one Skeene, in right of his wife, as next of kin of the testator, but not being supported by evidence, the Master did not allow it; and no claim had been brought before him as to the testator's heir-at-law.

The report was confirmed absolutely. . In July, 1814, the cause came on for further directions; and by the decree then made, it was declared that the charitable devises and bequests

for the charitable purposes in the will contained were
 * 477 void: and it was ordered * that the Master should appoint a proper person to get in the outstanding personal estate of the testator in the East Indies, and to receive the rents and profits of his real estates, with consequential directions. And it was further declared, that there not appearing to be any heir-at-law or next of kin of the testator, his real and personal estate became vested in his Majesty.

In pursuance of an order made by the Master of the Rolls, in November, 1815, the sums of 139,433*l.* 4*s.* 4*d.* 3 per cent bank annuities, standing in the name of the accountant-general in trust in the cause, and 3764*l.* 14*s.* cash, the amount of two half-yearly dividends on the stock, were transferred and paid to Messrs. George Harrison, assistant-secretary to his Majesty's treasury, and Henry Charles Litchfield, on behalf of his Majesty; and the stock was soon after sold, and the produce, together with the cash balance of 3764*l.* 14*s.*, paid into his Majesty's treasury. Those sums still remain in the treasury, and subject to the control of her Majesty.

In June, 1825, a petition was presented to the Master of the Rolls by the appellants and George Cawthorn (since deceased), which, after stating the matters already mentioned, and tracing their alleged relation to the testator as herein after stated, prayed that it might be referred to the Master to inquire and state to the Court who were or was the testator's next of kin and heirs or heir at law at the time

of his death and at the present time. The Attorney-General having, on the part of the Crown, consented to the prayer of that petition, an order was made by which it was referred to the Master to make the inquiries so prayed for.

A state of facts and pedigree were carried in by the petitioners before the Master, stating that G. Cawthorn *and the appellants, Mrs. Robson and Mrs. Ainsley, *478 were the only surviving children of Barbara Cawthorn, and that she and her sister Catherine Troutbeck (both then deceased) were the only surviving cousins-german of the said testator, and his sole next of kin at the time of his death: and in support of such claim, they stated that Ralph Troutbeck, who was married at Bowness in Cumberland, in 1670, was the grandfather of the testator; and that he (Ralph Troutbeck) soon after his marriage went to Ireland, and had six children; viz., Benjamin, Samuel, George, Mary, Barbara, and Elizabeth; that Benjamin and Samuel, two of the sons, were mariners, and, when in England, principally resided in Wapping; that George, the other son, and the three daughters went to reside at or in the neighbourhood of Bowness; that George afterwards removed to Riding, in Northumberland; and that Mary, Barbara, and Elizabeth, respectively, died without issue; that Benjamin died in 1697, having had three sons, Gabriel, Hastings, and Benjamin, all of whom were baptized in the parish of St. John, Wapping; that Hastings died under five, and Gabriel under thirteen, years of age; and as no trace could be found of Benjamin after the entry of his baptism, it was presumed that he also died without issue; that Samuel, the other son of the said Ralph Troutbeck, died long since, having had two sons, the testator, who was born in March, 1700, and baptized in the parish of St. John, Wapping, the 1st of May, 1708, and Benjamin Troutbeck, who was drowned, and died without issue in 1721; that the testator died in 1785, a widower, and without leaving any issue him surviving; that the said George Troutbeck, the remaining son of Ralph, died in 1763, having had ten children; viz., Robert, Ralph, Jane, George, John, another George, and William (all of *whom *479 died without issue in the lifetime of the testator),

Isabel, wife of William Cranston (who died in the lifetime of the testator, leaving issue one child, namely, Catherine Wilkinson, widow), and the said Catherine Troutbeck, and Barbara, the wife of William Cawthorn, who alone survived the testator, and being his sole surviving cousins-german, were his sole next of kin, and also his coheirs-at-law at the time of his death; that Catherine Troutbeck died in 1800, without having been married, leaving the said Catherine Wilkinson and Barbara Cawthorn her coheirs-at-law, and Barbara Cawthorn her sole next of kin; that Barbara Cawthorn died in 1806, leaving William Cawthorn, her eldest son and heir-at-law, and the said G. Cawthorn, and the appellants Mrs. Robson and Mrs. Ainsley, her only other children; that W. Cawthorn died in 1807, leaving the said G. Cawthorn, his brother and heir-at-law; that G. Cawthorn, together with his said sisters, had obtained letters of administration of the estate of their mother, Barbara Cawthorn, and were then her legal personal representatives; and that G. Cawthorn and Catherine Wilkinson were then the coheirs-at-law of the testator. The state of facts then detailed the nature of the proofs to be adduced in support of the above statement of pedigree.

Among the proofs produced to the Master — consisting of numerous registries of births, marriages, and deaths, with affidavits verifying them, wills, and other documents — was a narrative written in the year 1781, by Mr. John Troutbeck (already mentioned as a legatee in the will of Mr. Samuel Troutbeck), purporting to contain a history of the narrator's family, and noticing the said testator as one of the members thereof. The material facts of this narrative are stated

* 480 in the * Master's report, (a) which here follows, with his reasons for not admitting it in evidence.

The Master made his report the 23d of June, 1827; and after therein specifying the various pieces of evidence (including the said narrative) laid before him in support of the claim and pedigree as before detailed, on which the claimants relied, proceeded to state the conclusions to which he had

(a) They are more largely stated, 2 Russ. & M. 150 *et seq.*

come, to the following effect: "I find that the testator died in 1785, a widower, and without leaving any issue: I find that G. Troutbeck, who is alleged to have been the remaining son of Ralph Troutbeck, died in 1763, having had ten children; namely, Robert, &c. (stating the names of eight, and their deaths, &c., as mentioned before in the state of facts), and Catherine Troutbeck, and Barbara the wife of William Cawthorn, who alone survived the testator, and are alleged to have been his sole surviving cousins-german and next of kin at the time of his death; and I find that the said Catherine died in 1800, without having been married, leaving the said Barbara her sole next of kin; that she (Barbara) died in 1806, leaving W. Cawthorn, G. Cawthorn, Catherine Robson, and Isabella Ainsley, her only children; that W. Cawthorn died in 1807; and that G. Cawthorn, Catherine Robson, and Isabella Ainsley have applied for letters of administration of the estate of their mother, and will, upon obtaining them, become her legal personal representatives: and I find that Ralph Troutbeck, who is alleged to have been the common ancestor of the testator and the claimants, was married the 19th of June, 1670, but no registry of the baptism of any of his children can be found; but that he had a son named George, and two daughters named Mary * and * 481 Barbara, appears by the mention which is made of such son and daughters in the will of Robert Troutbeck, who was vicar of Corbridge, in Northumberland, and devised an estate at Riding to George, and bequeathed legacies to Mary and Barbara: and it appears that the said Ralph had a daughter named Elizabeth (by the registry of her burial at Bowness); that he had two sons, named Benjamin and Samuel, does not appear by any documentry evidence, but it is proved that the said George used to speak of and make inquiries concerning his brother Samuel. The report then proceeded thus: —

"And the claimants have laid before me a narrative of John Troutbeck, surgeon, who is alleged to be related to the testator, whereby it appears that the said Ralph Troutbeck had three sons, of whom George came over to England, &c.; and it has been submitted before me that such narrative

ought to be received in evidence, and is sufficient proof that Samuel Troutbeck, the father of the said testator, who resided in Wapping when he was in England, was the son of Ralph, and brother of George Troutbeck: and as a reason why the said narrative should be received, it was proved before me that the said John Troutbeck was a descendant of William Troutbeck, brother of the said Ralph; that he was known to the testator at Madras, in 1774 and 1776, and that he reduced into writing the said narrative of the Troutbeck family, wholly written in his own hand, and kept in his own possession up to the time of his death in 1792: and I find that after his death the same narrative was possessed by Wm. Troutbeck, his brother and executor, who gave it to Mrs. Bowes, by whose

order the same was delivered to Mr. Derby, a solicitor,

* 482 by * whom the same was delivered to Robert Simpson and John Wharton, in whose possession the same remained until it was brought into my office: and I find that the said narrative contains the following statement: 'Ralph married, was in Ireland, and had, 'tis said, three sons; George, one of his sons, came over to England; and after the death of Ralph, the widow came over with her other two sons, and lived (as Mr. Troutbeck of Madras informed me) somewhere in Wapping, London; she married one Nicholson, and went to live near her son George, in Ridon, near Corbridge, Northumberland, where she died; this I was informed by a daughter of George's, in 1780; Samuel and Benjamin, two of her sons, went on this to sea, and were both in the Prince George, Indiaman, when she was lost near Bombay; Benjamin, with most of the crew, was drowned; Samuel got to Madras, where he married a woman from Angengo, and had by her two sons, both of which died young:' and I find that such statement is erroneous in taking it for granted that Samuel, who got to Madras (the testator), was one of the sons of Ralph, whereas he was the son of a Samuel Troutbeck: and I find that the testator was the son of Samuel Troutback, and not of Ralph, as appears by the entry of his baptism in the register of St. John, Wapping, under date the 1st day of May, 1708, as follows: 'Samuel, son of Samuel Troutback, mar., and Sarah, *uxor*, aged eight years, the 9th

of March, 1708:’ and I find that the testator went to India with his only brother in the ship King George, and was shipwrecked in India, and his said brother drowned, as stated by the testator in his will: and I find that John Troutbeck, the author of the said narrative, was known to the testator, at Madras, and that the said narrative was * entirely * 483 in his own handwriting; and that the testator by his will gave him five gold star pagodas, as a person nearly of the same name with Troutback, though the testator declared that he solemnly believed that the said John Troutbeck was not any way related to him, &c.; and no evidence having been laid before me to show that the said John Troutbeck was a relation of the testator, except the said narrative, or to contradict the declaration of the said testator; and the narrative, if admissible, being erroneous as aforesaid, and there being no evidence, except the narrative, to show that Ralph Troutbeck was the paternal grandfather of the testator, I am of opinion that the said claimants have not made out their claim.”

George Cawthorn had died pending the reference. Exceptions were taken by the surviving claimants to that part of the Master’s report relating to the narrative (as not stating it to be admissible or not), and also to his conclusion against their claim.

Those exceptions came on for hearing before the Vice-Chancellor on the 16th of December, 1828; when his Honor, agreeing in opinion with the Master, by an order of that date, declared that they were insufficient, and they were overruled.

Against that order the claimants appealed to the Lord Chancellor (Lord BROUGHAM), who, after hearing the case argued for several days, delivered his judgment on the 22d of January, 1831, declaring the inclination of his opinion to be that the narrative was admissible in evidence, but that the question as to the appellants’ title ought to be decided by an issue at law, (a) which his Lordship accordingly directed by an order made on the same day.

That issue — which was in terms “whether Catherine

(a) See his Lordship’s judgment in 2 Russ. & M. 155.

* 484 * Troutbeck and Barbara Cawthorn were the next of kin, or two of the next of kin, of Samuel Troutback, the testator, living at the time of his death ; the appellants, Catherine Robson and Isabella Ainsley, to be plaintiffs, and his Majesty's Attorney-General to be defendant" — was tried before Mr. Justice LITTLEDALE, at the York Spring Assizes in 1831. The narrative of John Troutbeck was received in evidence ; and the plaintiffs also produced some further evidence in support of their claim, in addition to that which had been produced before the Master. The jury returned a verdict for the defendant ; and although the learned Judge's summing up was in favour of the plaintiffs, he afterwards told the Lord Chancellor that he was not dissatisfied with the verdict. (a)

On the 13th of June, 1831, the claimants moved, before the Lord Chancellor, for a new trial of the issue ; but his Lordship refused the motion, by an order of that date.

The claimants subsequently discovered that Mr. Dent, grandson of Mr. Pelling, one of the testator's executors, and then deceased, had lately returned to England, and was, by information which he had received from his grandfather, acquainted with many particulars respecting the testator and his family. Having procured from him an affidavit of those particulars, they, on the 15th of August, 1833, made a second motion before the Lord Chancellor for a new trial, but his Lordship refused that motion also, by an order of that date ; by which order, however, his Lordship directed that the claimants should be paid out of the fund arising from the testator's estate all their costs up to that time, as between solicitor and client, but not including the costs of that motion.

* 485 * The appeal was brought against the said four orders ; viz., the Vice-Chancellor's order of the 16th of December, 1828 ; the Lord Chancellor's order of the 22d of January, 1831, so far as it directed the issue ; his Lordship's order of the 13th of June, 1831, refusing a new trial ; and his order of the 15th of August, 1833, so far only as it refused the new trial.

(a) See Lord BROUGHAM's statement, *infra*.

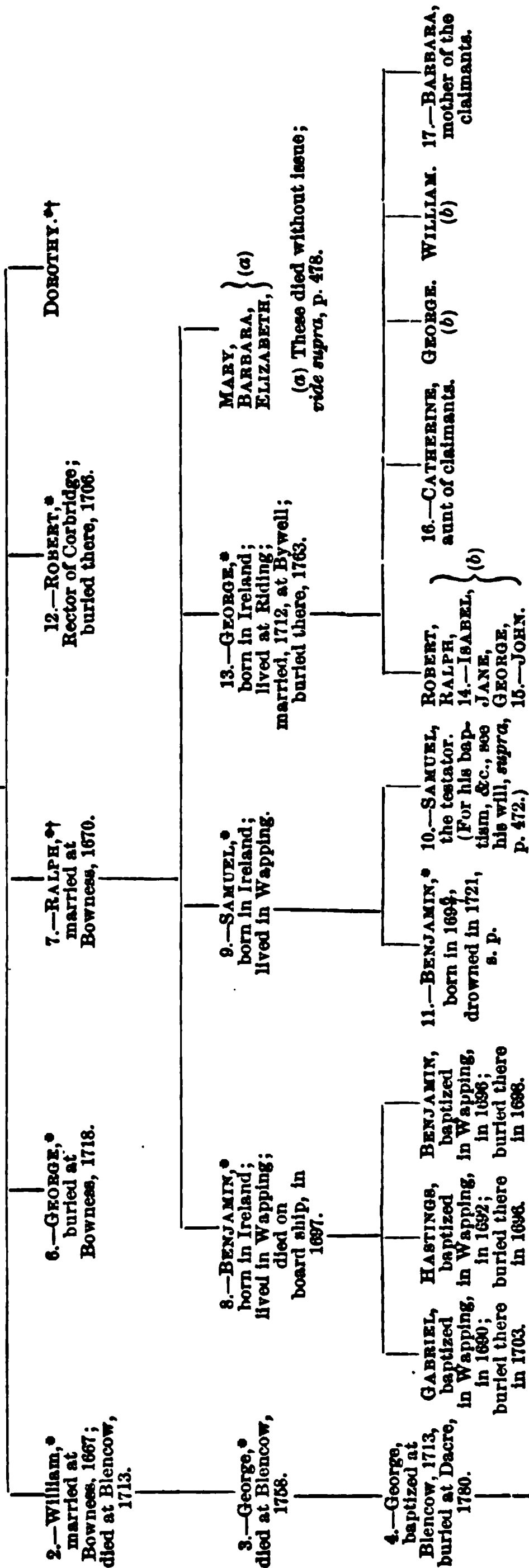
The petition of appeal prayed that the House would not only reverse those orders, but also hear and decide on the merits of the case. The appeal came on to be heard on the 27th of June and 4th of July, 1842, before Lord BROUGHAM, Lord COTTENHAM, and Lord CAMPBELL.

The pedigree in the next page is an abridgment of one which was annexed to the appellants' printed case, showing, as they contended, that Catherine Troutbeck and Barbara Cawthorn, the aunt and mother of the appellants, were proved, by the evidence adduced before the Master, and also at the trial of the issue, to have been first cousins and sole next of kin of the testator at the time of his death. The numbers are the same as those that were in the pedigree produced at the trial of the issue, and are preserved for convenience, although no reference is made to them in the arguments in this case.

[413]

1.—GEORGE TROUTBECK,

Son of Sir Robert Troutbeck; baptized at Newton, Cumberland, in 1614; was rector of Bowness, and buried there in 1691.



(b) All these were born and baptized at Bywell, between the years 1713 and 1731, and all, except Isabel (mother of Mrs. Wilkinson), died without issue in the lifetime of the testator. Catherine and Barbara, also born and baptized at Bywell, survived the testator.

* Baptism unknown.
† Burial unknown.

* *Mr. Pemberton* and *Mr. Erle*, for the appellants. — * 487
Samuel Troutbeck's will contains the history of himself; his statement that he was born in St. John's, Wapping, in the year 1700, exactly corresponds with the entry in the register of that parish, that he was baptized in 1708, "aged eight years, son of Samuel Troutbeck, mariner, and his wife Sarah." There is no entry in the registers of that parish of the baptism of any other Samuel Troutbeck, or Troutback, or Throwback, or Treback; for the name is found in all these spellings. The other statement in the will, that the testator's only brother, Benjamin, who with himself was a mariner on board the *King George*, was drowned when that ship was wrecked, was proved by the evidence, and is not now disputed.

The difficulty in the case is how to establish the relation of the claimants with the Troutbecks of Wapping. It is clear, on the evidence which was adduced before the Master and on the trial of the issue, that Catherine Troutbeck and Barbara Cawthorn, the aunt and mother of the claimants, were the only surviving grandchildren of Ralph Troutbeck, at the testator's death. This fact, indeed, was not disputed before the Master or on the trial of the issue, and it is so found in the Master's report; nor was it disputed, either before the Master or on the trial of the issue, that these parties were the sole next of kin of the testator, supposing the fact of the testator being also the grandson of Ralph Troutbeck was established. The great point in contest was and is the relationship between the testator and Ralph Troutbeck. It is established that the testator was the son of a Samuel Troutbeck, by Sarah his wife; then, in order to show the manner in which it was proved that Samuel, the father of the testator, was the son of Ralph, the grandfather * of the claimants, ref- * 488
erence must be had to the facts which were proved respecting Ralph. He was married at Bowness, in Cumberland, on the 19th of June, 1670; he was the son of George Troutbeck, the rector of that parish; he afterwards went to Ireland, and there had three sons, Benjamin, Samuel, and George; and three daughters, Mary, Barbara, and Elizabeth, who died unmarried. There is no proof by parish registers

of the births or baptisms of those children: there were no such registers then kept in Ireland. Samuel, the second son, however, was clearly established by other evidence to be the Samuel Troutbeck, the father of the testator. The narrative left by John Troutbeck, who is proved to have been a great-grandson of William, the brother of Ralph, states that Ralph had gone to Ireland and had three sons; that George, one of them, "came over to England, and, after the death of Ralph, the widow came over with her other two sons, and lived (as Mr. Troutback of Madras informed me) somewhere in Wapping; she married one Nicholson, and they went to live near her son George, in Ridon, near Corbridge, where she died, &c. Samuel and Benjamin, two of her sons, went on this to sea, and were both in the Prince George, Indiaman, when she was lost," &c. The author of this narrative was a surgeon in the maritime service of the East India Company, and was acquainted with the testator in India, in the years 1774 and 1776; he afterwards settled in Aldersgate Street, London, and died in 1792. It is proved in evidence that he was always esteemed a man of strict honour and veracity; that the narrative in question is entirely in his handwriting, and was discovered among his papers after his death, by William

Troutbeck, his brother and executor. In the narrative he makes this one mistake: he * confounds Samuel and Benjamin, the sons of Ralph, with Samuel and Benjamin, the sons of Samuel, the son of Ralph. In all other respects the narrative perfectly accords with all the other evidence respecting this family. The will of Robert Troutbeck, rector of Corbridge, and brother of Ralph, is confirmation of the narrative with respect to one of the sons of Ralph, namely, George; and this will also mentions two of the daughters of Ralph, namely, Mary and Barbara; it was proved that they and their sister Elizabeth died without issue before the testator.

It was also proved that George Troutbeck, the son of Ralph, was always reputed to have had a brother named Samuel, and that he frequently spoke of such brother. Benjamin, the eldest son of Ralph, was a mariner, lived at Wapping, and died on board his Majesty's ship the Breda, in 1697.

He had three sons, Gabriel, Hastings, and Benjamin, all baptized in St. John, Wapping, as appears by the registers : and it also appears by the registers that the first two died quite young ; and as no trace is found of the third, after his baptism in 1696, the legal presumption is that he was dead without issue, at the time of the testator's death.

George, the third son of Ralph, lived at Riding, in the parish of Bywell, in Northumberland. He had ten children, all of whom, except Catherine and Barbara, are proved to have died before the testator. Catherine and Barbara survived the testator, and were his first cousins ; and there being then living no nearer relation of his, they were consequently his sole next of kin. Catherine died unmarried in 1800. Barbara died in 1806, leaving the appellants, Catherine Robson and Isabella Ainslie, — and their two brothers, since deceased without issue, — her only children, who * ob- * 490 tained letters of administration of the estate and effects of their aunt and mother, and thereby became their legal personal representatives.

The case of the appellants, as now stated, was established by the evidence before the Master, and no evidence in contradiction was adduced, either on the part of the Crown or of any other parties ; and the appellants therefore submit that the Master ought to have reported in their favour, and that, consequently, the order of the Vice-Chancellor, overruling their exceptions to the Master's report, was erroneous ; and that the order of the Lord Chancellor, by which his Lordship directed an issue instead of reversing the Vice-Chancellor's order, was also erroneous.

In addition to the evidence before the Master, the appellants, on the trial of the issue, produced further parol evidence of the family of Ralph Troutbeck having come from Ireland, and of George his son having spoken of his brother Samuel, and the three daughters of George having spoken of their uncle Samuel. They also produced the will of George Troutbeck, the rector of Bowness, the father of Ralph, dated in 1691, which confirmed the statement in the narrative with respect to the family of Ralph. There cannot be a doubt that the verdict of the jury was against the weight of evi-

dence. The Lord Chancellor, therefore, ought to have granted a new trial of the issue, or should, on the clear case then laid before him, and without any further trial, have allowed the appellants' exceptions to the Master's report. In either view, his Lordship's order of June, 1831, was erroneous.

Subsequently to that order, the appellants procured from Mr. Dent an affidavit, containing further proofs of the relationship of the testator to George Troutbeck, their * 491 grandfather, and confirming, in * other respects, the case made by them: and with this affidavit they renewed their motion for a new trial, which the Lord Chancellor again refused by his order of August, 1833; but such was the impression on his Lordship's mind, of the case made by the appellants, that he directed all their costs up to that time to be paid to them out of the testator's estate.

Whether Mr. Dent's affidavit was admissible evidence or not, the case of the appellants was so reasonably made out, independently of it, in the several motions made before the Lord Chancellor, that his Lordship might have decided in their favour on the written evidence alone without further trial. The rule in equity acted upon by most eminent Judges, is, that the Court will take upon itself to draw the conclusions from conflicting documentary evidence, as being more competent to do so than a jury. (a) In *Fisher v. Lord Graves*, (b) Chief Baron ALEXANDER says, "The question is, whether I shall take on myself to decide this case without an issue:" "as the case depends chiefly on the construction of ancient documents, of which I think I can draw the conclusion as well as a jury, I should only be putting the parties to unnecessary expense." In *Slaney v. Wade*, (c) Lord COTTENHAM says, "This is not a case in which a trial at law is a matter of right: the question of heir or not heir, as a ground of the plaintiff's title, is a question which the Court will decide for itself, or send it to be tried elsewhere, according to the circumstances; and the question which I have to consider is, whether there is before me sufficient evidence of the plain-

(a) Daniel's Chan. Prac. vol. 2, p. 730 *et seq.*

(b) M'Clel. & Y. 362, 379.

(c) 1 My. & Cr. 338-353.

tiff's title as heir to enable the Court safely to adjudicate to him the right," &c. * And his Lordship being of * 492 opinion in that case that there was sufficient evidence of the plaintiff's title, he declared in his favour. In the very late case of *Lloyd v. Waite*, (a) Lord LYNDHURST acts upon the same rule most decidedly, saying, "I think it" (to grant a trial) "would be a very improper exercise of the authority of the Court, and a very unsound exercise of its discretion." "I think that the Court, being satisfied that the pedigree has been satisfactorily established, ought not to allow him to have a trial at law before it pronounces a decree," &c.

The whole question in the present case depends on written evidence, there being only two witnesses who could be examined, and they fall into the same mistake as the author of the narrative, confounding the testator with Samuel Troutbeck, the brother of George; but the evidence leaves no doubt that George, though not the brother, was connected with the testator. The narrative was admitted in evidence at the trial, as being a statement made by a connection of the testator; and that it was properly admissible is clearly shown by Lord BROUGHAM in his elaborate judgment on the appeal from the Vice-Chancellor, (b) which is now a leading decision on such questions. It was never held until the case of *Johnson v. Lawson*, (c) that no statement should be received in pedigree cases unless made by a relative. Several cases to the contrary are mentioned in Mr. Starkie's Treatise on Evidence. (d) Many persons connected with a man may know more about him than his blood relations: as his executors and trustees, such as Mr. Pelling was in this case. His declarations relating to Mr. Troutbeck, — admitting his liability to * pay a large sum on account of Troutbeck's * 493 estate, — as contained in the affidavit of Dent, Pelling's grandson and executor, would be evidence in a suit against him or his representatives by Troutbeck's representatives, *Stead v. Heaton*; (e) and such declaration or admission, in an answer by him or his representatives to a bill in Chancery

(a) 1 Phill. 61, 68.

(b) 2 Russ. & M. 147.

(c) 2 Bing. 86.

(d) Vol. 2, p. 605, n. (2d edit.).

(e) 4 T. R. 669.

for an account of the estate, would be evidence; *Short v. Lee*; (a) and ought, therefore, to have great weight with the Court in this case. The appellants trusted that their Lordships would give due consideration to all the evidence, and decide accordingly; but if it should appear that a trial at law is necessary, then their Lordships would give the proper directions for the admission of the affidavit of Mr. Dent (who has died since), as the declarations therein contained seem entitled to.

[LORD COTTENHAM. — The Court of Chancery, in directing an issue, would not order that to be made evidence at the trial which it would not receive in evidence itself.]

In *Gompertz v. Ansdell*, the order directed all the documents that could be produced to be received.

[LORD COTTENHAM. — The object there was to detect a fraud.]

Mr. Twiss was going to address the House for the respondent.

Lord COTTENHAM (who presided) told him not to trouble himself about the order directing the issue; it was too late to impeach it, after the issue was directed with the consent of all parties; and it was not until the appellants found the result adverse that they complained of that order. The question is still open as to that part of the appeal asking a new trial.

* 494 * *Mr. Twiss* proceeded, and was followed by the Solicitor-General on the same side. — The only point, then, is whether George Troutbeck, who lived at Riding, and was undoubtedly the ancestor of the claimants, was the uncle of the testator. The narrative stated that they were brothers, which was found to be incorrect. It is very questionable

(a) 2 Jac. & W. 464, 475.

whether the narrative was at all admissible in evidence, according to the rules of Courts of Equity; but without discussing that point now, we submit that it does not prove any connection between the testator and the claimants. The evidence at the trial showed that they were of different families; the former belonging to the Troutbecks of Wapping, and the latter to the family of Troutbecks who lived in Northumberland, and removed to Nottingham and Northampton. Some members of this northern family were alleged to have been missing, and two of a like name are found in Wapping: the attempt to connect these has failed. There is no proof even that any were missing from the northern family, but the hearsay reports of strangers after the testator's death and after litigation had commenced, which Mr. Justice LITTLEDALE received in evidence, and it was not therefore now competent to the respondent to say it was inadmissible. If the Samuel and Benjamin alleged to have been missing from the northern family, were the brothers of George, would he not have mentioned them in his will, in which he mentions other brothers and sisters? or would not some mention of them be made in the wills of other members of the family?

On the only remaining point, whether Mr. Dent's affidavit is admissible, the case of *Johnson v. Lawson* (a) is decisive that the declarations of strangers in blood *are *495 not to be received in cases of pedigree, with the only exception of a husband. The first application for the new trial was put on the ground that the testator's will was not produced, and that these plaintiffs were deprived of a reply by their counsel. If the will had been produced, it would show that the testator had no living relations; and all that the reply could effect would be to fill up the hole which the production of the will would have made in their case. It is said there is but one link wanting; but if a concession be made of one link, it is possible for any man to prove his relation with another; even with the royal family of England or of France.

(a) 2 Bing. 86.

This matter has been discussed on so many occasions and before so many Judges, that it is now fit there should be an end of it; *sit finis litium*: There is no new evidence to be produced, and no jury would attach more weight to the evidence that exists than the former jury did.

Mr. Pemberton, in reply, would not anticipate what conclusion their Lordships would come to; but it is clear the Crown holds large property which the appellants claim to be entitled to, and the Crown ought to give them an opportunity of establishing their title to that property.

The question is, whether the trial which was had in 1831 was quite satisfactory. It is impossible that it could be so, when the testator's will was not put in evidence. We always, in the Courts of Chancery, hear it asked in such motions, — Were all the documents submitted to the jury? If the subject of the suit was land and not money, the Court of Chancery would grant the claimants another trial as matter of right, and even a third trial. In *Wright v. Tatham*, * 496 although * the trials of the issue were adverse to the heir-at-law, he afterwards succeeded in two out of three trials in ejectment; and this House confirmed the heir's title. (a) The House, therefore, should be slow in refusing to these claimants a second chance of establishing their right to this large property.

The connection between the Northumberland and Wapping Troutbecks depends on the narrative of John Troutbeck. George, the youngest of the three brothers, after their return from Ireland, went to his relations in the north, while Samuel and Benjamin remained in Wapping, where they first arrived, and becoming mariners there, were lost sight of by the other branches of the family. They are found at Wapping in 1690; not born there, nor connected with any person there.

August 18.

The case stood over until the 18th of August, 1843, when Lord COTTENHAM moved the judgment of the House, as fol-

(a) *Wright v. Tatham*, Vol. V., *ante*, 670.

lows: This is, in substance, an appeal against an order of the Court of Chancery of the 13th of June, 1831, refusing a new trial of an issue, to try whether the appellants or those whom they represent were next of kin of Samuel Troutback, who died at Madras in July, 1785. An inquiry as to who was next of kin, with the usual advertisements, was directed by the decree of the 18th of November, 1794. The appellants did not come in under that decree, but on the 23d of June, 1825 they obtained, with the consent of the Crown, a renewed inquiry as to the next of kin.

The Master having disallowed the appellants' claim, they took exceptions to the report, which were overruled by the Vice-Chancellor; whose order was appealed * from * 497 to the Lord Chancellor, who directed the issue. The appellants tried the issue and failed, and then moved for a new trial, which was refused; and that order was acquiesced in for two years, at which time another motion for a new trial was made, upon the ground that new evidence had been discovered. That motion was also refused, by the order of August, 1833; and that order was acquiesced in till the present appeal was presented, which is made to embrace all these orders, including that which overruled the exceptions to the Master's report; asserting, therefore, that after an issue had been directed and tried, the House ought to decide, upon a question of fact, that the Court ought to have decided in favour of the party who have failed upon the issue, without any trial at all.

I do not say that the length of time which has elapsed since the decision of the Court of Chancery upon this case, ought to preclude the appellants from obtaining the deliberate consideration of the House upon the merits; but I am of opinion that it would have been as well if the appeal had been confined to the order which disposed of the case upon its merits, which I consider to be the order of the 13th of June, 1831: for it cannot have been supposed that the affidavit of Mr. Dent, which was made the ground for the subsequent application in 1833, could possibly affect the decision of the Court.

The only question therefore is, was there in 1831 sufficient

ground laid before the Lord Chancellor for a new trial of the issue. I have examined the evidence with the greatest care, and I think this a case in which there ought to be a strong leaning towards every application for further investigation, which may possibly lead to a discovery of the truth ;

* 498 for in these * cases in which the property falls to the

Crown for want of next of kin, there is scarcely a doubt but that some persons are entitled if they could be found ; and the title of the Crown generally rests, not upon there being no next of kin in existence, which is very improbable, but because there are no persons who can prove themselves to be so. The title of the Crown is perfect till such proof is made, and those who make the attempt cannot succeed without establishing their alleged title by proper evidence.

The title which the appellants select, and which they must therefore prove before they can succeed, is that Catherine and Barbara, through whom they claim, were first cousins of the testator, having a common grandfather, Ralph ; that is, that they, Catherine and Barbara, were daughters of George Troutbeck, who was a son of Ralph, and that this Ralph had another son, Samuel, who was father of the testator. In this inquiry the real question is, Was the testator's father a son of this Ralph ? there being no doubt that Ralph had a son George, who was the father of Catherine and Barbara. The only direct evidence of the testator's family is from the register of his baptism and that of his brother Benjamin. In the register of baptisms of the parish of St. John, Wapping, under the date of the 1st of May, 1708, there is the following entry : " Samuel, son of Samuel Troutbeck, mariner, and Sarah, *uxor* ; aged eight years, the 9th day of May, 1708 ; " and that this was the testator cannot be doubted, as he in his will states that he was born at St. John's, Wapping, in 1700.

Before adverting to the evidence by which the appellants attempt to prove that this Samuel, the father, was a son of Ralph, it will be convenient to advert to the very

* 499 strong evidence that he was not. * There are several wills produced which bear strongly upon this point ;

and first there is the will of George, the father of Ralph, which is dated 1691, and by which he devises his estate to his own son George, then to George the son of his son Ralph, then to his own son Robert, and then to his own son William, but not mentioning Samuel or any other son of Ralph. There is then the will of Robert, brother to Ralph, dated 1718, by which he gives property to George, son of his brother Ralph, then to his own brother George, and then to his brother William, but makes no mention of Samuel or any other son of Ralph. There is then the testator's own will, declaring that he has no living relation.

It appears that John, who wrote the narrative, was descended from William, one of the brothers of Ralph, and that when in England he was in the habit of intercourse with the descendants of George, one of the sons of Ralph, that is, with the family of the claimants; and that he also, when at Madras, had intercourse with the testator; and evidently, from the narrative, was desirous of proving that this rich old man was of the same family, and he certainly had the means of informing him of the existence of the branch to which the claimants belong; and if the testator was related to that branch, he was also related to John, the author of the narrative. It must be supposed that the testator had heard all upon this subject that this John was able to inform him of; and what was his conclusion? He says that he has no relation or kindred alive or in being; and as to John, he says that he is a person of nearly the same name, though he solemnly believed and declared that he was not any way related to him, or of the same family or kindred with him, and he disclaimed all relationship with him or to him.

* It is an essential part of the appellants' case, that * 500 Ralph had not only a son named Samuel, but another son named Benjamin, who was the father of Gabriel, Hastings, and Benjamin, the register of whose baptisms is found at Wapping; but it appears that if this Benjamin was the son of Ralph, — as to which all the wills before referred to are at least silent, — the grandson of Ralph, that is Gabriel, must have been born within twenty years after the marriage of his grandfather, his baptism being in April, 1690, and the mar-

riage of Ralph in June, 1670; a thing not impossible, but adding to the improbability of Ralph having had any such son. It also appears that the family occupied a certain station in the world: George, the father of Ralph, was a clergyman, and so was his son Robert; and the wills prove their possession of some landed property, which John, in his narrative, says was very large. But this Samuel and Benjamin, the supposed sons of Ralph, are found as common sailors at Wapping. In the registers of the children's baptisms they are called mariners. The will of Benjamin proves that he served on board of several ships of war as a mariner; and Samuel and Benjamin, the real sons of Samuel, both went to sea in an Indiaman.

Against all this evidence and these presumptions, the appellants produce a narrative, proved to be in the handwriting of John, who, if the appellants' pedigree was correct, would be the second cousin once removed of the testator. If that paper had been sufficient to prove the appellants' pedigree, it would have been necessary to consider its admissibility; but being of opinion, that with the aid of that paper the appellants have failed in establishing their case, I think

it will be more satisfactory to consider their case as it
* 501 stood with the aid of the document, wishing * to be

understood as not expressing any opinion as to the admissibility of it in point of law. It is dated 1781. It does not profess to be correct, but, on the contrary, says that it was the best account the writer could at present collect, and was committed to paper as a memento, hoping for some opportunity to revise and make it more correct and perfect, and that there appeared a deficiency about the two generations, which nothing but the examination of old wills could rectify.

The narrative commences with a great error, for it makes Ralph to be the son of William, and not of George, as the wills prove that he was; and it gives to George only two children, daughters, whereas the wills prove that he had four sons. The important part, however, is that which relates to Ralph: 'Ralph married, was in Ireland, and had, 'tis said, three sons. George, one of his sons, came over to England,

and, after the death of Ralph, the widow came over with her other two sons, and lived (as Mr. Troutbeck of Madras informed me) somewhere in Wapping, London. She married one Nicholson, and they went to live near her son George, in Ridon, near Corbridge, Northumberland, where she died. This I was informed by a daughter of George's, in 1780. Samuel and Benjamin, two of her sons, went on this to sea, and were both in the Prince George Indiaman when she was lost near Bombay. Benjamin, with most of the crew, was drowned. Samuel got to Madras, where he married a woman from Angengo, and had by her two sons, both of which died young."

It appears that the author of the narrative, who was a surgeon, had made several voyages to the East Indies, between the years 1770 and 1780; and the narrative itself, and the will of the testator, prove that * he had * 502 at Madras had intercourse with the testator, and had discussed with him the history of the family. If what the narrative states the writer had been informed of by the testator is construed to apply to the whole statement, as to the wife of Ralph having come to England, and settled at Wapping with her two sons, Samuel and Benjamin, &c., it is contradicted by the testator's will; for if he had believed these facts he would not have thought that he had no relations living, or that John was not of his blood. The probability is that the only fact he got from the testator was, that he had come from Wapping, and had been shipwrecked with his brother; and that all the rest, as to whence the Troutbecks of Wapping had come, was mere conjecture, adopted to establish a relationship with a rich and childless old man.

This statement, however, is proved to be erroneous; for the registers of baptisms prove that the Samuel and Benjamin who were shipwrecked were not sons of Ralph, but of Samuel and Sarah, and that they did not come from Ireland, but were born in Wapping. If it is true that the widow of Ralph did come to Wapping with her two sons, Samuel the father of the testator, and Benjamin the father of Gabriel, may have been such two sons, and that must be assumed to support the appellants' case; but of that there is no evidence

whatever. The testator could not so have informed the narrator, the narrative stating the facts differently, and the testator's will disproving any such supposition ; and certainly the testator would not have furnished the narrator with the statement as it stands, as it is contrary to the fact of which the testator proves that he was cognizant, stating that he was born at Wapping. The narrative indeed introduces this

statement with the words " 'tis said," not saying by
 * 503 * whom. If the statement in the narrative cannot be true, and there be nothing by which the extent of the error can be ascertained, it would be extremely hazardous to conjecture what part is true and what is false ; the part selected for adoption may be equally erroneous, though not proved to be so.

On examining the other parol evidence in support of the appellants' case, it must be recollected that John, the narrator, is proved, in the intervals between his voyages to the East Indies, to have been in the habit of intercourse with the family of George, the son of Ralph, that is, with the family of the claimants ; indeed, the narrative proves such intercourse in 1780. The narrator's theory, by which he connected the testator with this and with his own branch of the family, must be supposed to have been the subject of discussion ; and if that be assumed, the fact of all the reputation proved being that the testator was a brother of George and a son of Ralph, may be explained. Upon any other supposition the prevalence of the idea, clearly proved to be erroneous, could not be accounted for ; this common error proves the piracy. It must also be recollected that it is part of the claimant's case, and there is some evidence of the fact, that the widow of Ralph was for some time living with or near her son George. If, therefore, the Troutbecks who lived at Wapping were her sons, and particularly if she established them there, as the narrative states, there could not have been any doubt or misapprehension in that branch of the family as to who they were, or what had become of them. If, as the narrator states, the widow of Ralph, upon her sons' going to sea, went to live near her son George, this must have taken place early in the 18th century. From the will of George, the

father of Ralph, it would appear * that Ralph was * 504
dead in 1691, and her sons probably went to sea early ;
George, therefore, must long before he died have known all
about his brother Samuel, if he ever had such a brother ; and
yet Michael Johnson (a witness at the trial), at the age of
eighty-eight, speaking of what he had heard George say
seventy years before (for he died in 1763), makes him say
that he wondered what had become of his brother Samuel.
Catherine Wilkinson, another witness at the trial, whose
evidence is too confused and contradictory to be worthy of
any attention, also speaks of the family having expressed
wonder as to what had become of Samuel, a supposed
brother of George, and yet she speaks of Mrs. Nicholson,
the widow of Ralph, having been with that part of the
family ; but she also proves that the family were aware of
the death of the testator and of his riches, and speaks of
advertisements about him, which would have been then in-
serted under the decree of 1794, and yet no claim was made.

This parol evidence, such as it is, corresponds with the
narrative, that George had a brother named Samuel, sug-
gested possibly by John, the narrator ; for although the wit-
nesses speak to declarations long before the time at which he
could have communicated with them, if the idea once got
possession of their minds, it may account for what they sup-
pose themselves to have recollected as being said by others.
But assuming that those declarations ought to prevail against
the evidence afforded by the wills and the absence of all the
ordinary proof of relationship, and that it were believed that
there was a Samuel, a brother of George, the case would be
still far short of what would be necessary to establish the
case of the claimants. It would only come to this, that there
was a Samuel, a brother of George, and that a Samuel
* was found at Wapping, without any thing to connect * 505
them, except the narrative, which, for the reasons be-
fore given, cannot be relied upon, and, in fact, disproves the
identity of the person.

It appears to me, therefore, that the appellants have failed
to make out their claim, and that the appeal must be dis-
missed.

LORD BROUGHAM. — As this is an appeal from a decree of my own, twelve years ago, in the Court of Chancery, I shall certainly say nothing except to state that I retain my opinion upon the case. It has not been altered, but I must say that I never decided a case in my life with more reluctance than I did that. I felt all the pain in deciding this case which my noble and learned friend has so properly and fitly adverted to. One always feels in these cases that the party fails, not because the Crown is really entitled on the failure of next of kin, but that there is only a failure of proof on the part of the party claiming; that he cannot, by strictly legal evidence, duly prove himself to be the person he represents himself to be. Therefore, I certainly felt very great reluctance in this case, and the more so on account of what I heard from the learned Judge who tried the issue when first I sent it to trial, reversing the order of the Vice-Chancellor. It was tried at the Spring Assizes in 1831: the Attorney-General, the present Lord DENMAN, going down specially for the Crown, and Sir FREDERICK POLLOCK, the present Attorney-General, leading on the other side. I happened to go to York on my way to the north during the vacation. I was not present at the trial; but I saw the learned Judge, Mr. Justice LITTLEDALE, after the trial, and that very learned

Judge told me that he had in his own mind no moral
 * 506 doubt * that the case was true, though the legal evidence was not sufficient; that he felt a very strong moral conviction that it was so, contrary, certainly, to the decision of the jury, because they were bound to decide upon the legal evidence. That being the case, I was bound to share in that feeling, subject to the observations which my noble and learned friend has made in his very accurate statement of the evidence. Nevertheless, all these circumstances have increased my regret; for when I sent for the Judge's notes on the motion for the new trial, as I used to do in the Court of Chancery, I certainly did find in them a memorandum that he could not say that he was dissatisfied with the verdict. He told me that he should have been as well satisfied if the verdict had been the other way, but he could not say positively that he was dissatisfied with it. This was,

therefore, a very slender case on behalf of the Crown, — a case which leads one very much to wish that there had been legal evidence so clear as to cast it the other way. However, all I shall say at present is, that the unfortunate parties who have lost here, as well as in the Court below, must, upon the affirmance of this decree, have recourse to the Crown in another shape; they must be suitors in another form: and I would fain hope that some mercy may be shown, at all events, as regards the costs of this suit. We give no costs: the parties must apply to the Crown.

LORD CAMPBELL. — All we have to consider is, whether judicially the appellants have made out their case; because it is quite clear that unless they have given reasonable evidence to support their claim, the issue is well found and the learned Judge was right in his decree. After having considered this case very deliberately, *it appears to me *507 that the appellants have not given sufficient evidence to make out their case. I think that the verdict was correct, and that my noble and learned friend, who then held the Great Seal, was bound to refuse a new trial. I cannot say that I entertain any doubt; I think the order of the Court of Chancery ought to be affirmed.

LORD COTTENHAM. — I will only add, in consequence of what has fallen from my noble and learned friends, that it is quite clear, whether these parties are or are not related to the testator, they are not related in the way they suppose themselves to be; they entirely failed in making out their case in the way in which they launched it. It is quite clear that they are not related to him in that way; therefore there is just as much probability of other individuals of the same name making out their relationship to the testator, as these individuals. The Crown is bound to hold the money for any individuals who may make out a claim to it; and, of course, before the Crown in its bounty can be expected to bestow any portion of this money upon any individual, those who advise the Crown must be quite sure that there are no others who can have an opportunity of making out a case of

relationship. This is only a decision upon a particular state of evidence.

LORD BROUGHAM. — It is only a decision upon the evidence before us.

(It was ordered and adjudged that the appeal be dismissed, and that the orders therein complained of be affirmed.)

1844.

CHARLES HOARE and Others *Appellants.*
 GEORGE BYNG and Others *Respondents.*

Will; Construction. "Personal and Landed Estates." "Then," and "Afterwards."

A testator left all his personal estate subject to legacies, and all his houses, gardens, parks, and woods, and all his landed estates, to his wife for her life, and afterwards all his personal and landed estates to his sister for her life, and then to the eldest son of G. B., and afterwards to G. B.'s second, third, or any later sons he might have by the testator's niece A., and then to the eldest son and other sons successively of the Earl of B. by the testator's niece C.; but all these to be subject to out-payments and legacies by the will given; and if they and the conditions of his will were not complied with exactly, he left all the advantages of it to the next person in succession, subject to the legacies and so on, unless they were discharged. The testator, by codicils to the will, gave numerous legacies and annuities, upon the non-payment of which he declared repeatedly and in various forms of expression that the persons taking his personal estate should be subject to the penalties in the will. G. B. had several sons, all living at the death of the testator.

Held, that the eldest son of G. B. took the personal estate absolutely, subject to the prior life-estates, and to the legacies and annuities given by the will and codicils.¹

¹ See *Audsley v. Horn*, 1 De G., F. & J. 226, 236, 237. In *Summers v. Mitchell*, 34 N. H. 45, FOWLER, J., observed: "Nothing is better

February 26 and 27, 1844.

THE question in this appeal was, whether the respondent George Byng is entitled absolutely, or for life only, to the residuary personal estate of the late Earl of Strafford, subject to certain annuities charged thereon and still subsisting, under and by virtue of the provisions contained in the will of that nobleman, who died in 1791.

William Earl of Strafford, by his will, dated the 25th of October, 1774, gave as follows: "I leave to my dear wife, Anne Countess of Strafford, all my personal estate whatsoever, except the furniture of Wentworth Castle, for her life, subject to the following out-payments and legacies: I also leave to my * wife, Anne Countess of Strafford, * 509 all my houses, gardens, parks, and woods, and all my landed estates, for her life, and afterwards all my personal and landed estates to my eldest sister, Lady Anne Conolly, for her life, and then to the eldest son of George Byng, Esq., of Wrotham Park, and afterwards to his second, third, or any later sons he may have by my niece Anne, Mrs. Byng, and then to the eldest son and other sons, successively, of the Earl of Buckingham by my niece Caroline; but all these to be subject to the following out-payments and legacies."

The testator then gave several legacies to his wife and to his friends, and annuities for life to persons in his employment; and added, "If the legacies and conditions of this my will is not complied with exactly, then I leave all the advantages of it to the next person in succession, subject to these legacies and so on, unless they are discharged." He appointed the Earl of Dartmouth and three others his executors.

The testator afterwards made thirteen codicils. By the first, dated the 26th of January, 1778, after giving several legacies and annuities, he added, "If these legacies are not

settled than that, at common law, a devise to one generally of lands and personal estate, without any words of limitation or perpetuity, gives to the devisee an estate for life only in the lands, but the personal property absolutely; unless in respect to the real estate there be a manifest intention to give a fee." 2 Jarman Wills (4th Am. ed.), 125, note (2) and cases cited.

paid punctually, those that inherit my personal estate are subject to the penalties in my will." By the second, after several bequests of pictures, he gave small annuities to four of his servants for life, adding to each the words, "to be paid on the same conditions as the other annuities I have left." By the third, after appointing Lord THURLOW (Lord Chancellor) a trustee and executor, in addition to those named in his will, and after giving other legacies and annuities, he added, "If these legacies are not exactly paid, those that have my personal estate are to be subject to the penalty in my will."

By the fourth, after giving an annuity to his coachman * 510 for * his life, he added, "and I mean this legacy to be secured to him the same as the others I have left, and that my trustees and executors will see it performed." By the sixth he gave further annuities to his servants; and added, "these legacies to be faithfully paid under the same restraints as the others in my will and codicils." By the seventh he gave his wife's servant, H. W., 50*l.* a year, "to be paid yearly during her life by my heirs that have my personal estate, and on failure of doing so, my heirs are to be subject to the same penalties as they are to be subject to in not paying the other legacies and annuities. I also leave to S. R., my footman, the additional sum of 40*l.* a year, to be paid yearly during his life, and 200*l.* in money, to be added to what I have left him in another codicil; on failure of my heirs to my personal estate doing this, they are to be subject to the same penalties in my will for not paying the other legacies and annuities. I leave to Frederick William Wentworth, Esq., of Dorsetshire, the sum of 5000*l.*, and to Mrs. Wentworth, his wife, the sum of 2000*l.*; my heirs, on failure of this payment, to be subject to the penalties in my will." The eighth codicil began thus: "I write this codicil to be added to the other codicils of my last will; that I would have all the conditions and legacies in my will and codicils exactly executed as I have directed, with the penalty of any failure as I have directed." Then followed two legacies of 3000*l.* each to a nephew and niece of the testator, and a devise of real estate to his footman, S. R., and heirs for ever. By the ninth, after giving further annuities to his servants for their

lives, he added, "my heir to be subject to all former penalties relating to my legacies, if these are not regularly paid." By the tenth he gave further legacies; and added, "these * legacies to be exactly paid by whoever has my per- * 511 sonal estate, or else my personal estate to go on the same conditions to the next I have entailed it to." The twelfth began thus: "I add this codicil to my will, which is to be fulfilled by my heir to my personal estate, or else he is to forfeit, to the next person I make my heir, all I have left him." Then followed several bequests of annuities and legacies. The thirteenth and last codicil, dated the 9th of January, 1791, began thus: "I add this codicil to my will, to be fulfilled under the same conditions as my will and other codicils;" and it ended with further bequests.

The will and the eighth codicil only were duly executed and attested so as to pass real estates.

The testator survived his said wife, and died in March, 1791, leaving his sister, Lady Anne Conolly, him surviving. The will and codicils were duly proved in the same year by Henry Seymour Conway alone, one of the executors named therein.

George Byng, of Wrotham Park, named in the will, had four sons; namely, George Byng, the respondent, his eldest son, and John, William, and Robert Byng, who were all living at the death of the testator.

In January, 1792, Lady Anne Conolly exhibited her bill in the Court of Chancery against the Earl of Dartmouth and the other trustees and executors, the respondent George Byng, and the said John, William, and Robert Byng, and others; thereby stating, among other things, that the said Lady Anne Conolly was then become entitled to all the personal estate of the testator, and all the interest thereof, during her life, subject to the payment of the debts and such of the legacies of the testator as the Court should be of opinion were due to the several legatees under the * will and codi- * 512 cils; and she, by her said bill, also insisted that the persons to whom the testator had bequeathed his personal estate after her decease were entitled, under the will, to no more than a life-estate therein; and that she, as one of the

testator's next of kin (all of whom were named in the bill), would, after their deaths, be entitled to a share of such personal estate as remained undisposed of. The bill prayed that accounts might be taken of the personal estate of the testator, and of his funeral and testamentary expenses, and debts and legacies; that the personal estate might be applied in payment of the said debts and such of the legacies as the Court should be of opinion were payable under the will and codicils; that after payment thereof, Lady Anne Conolly might be declared entitled during her life to the interest of the personal estate; and that it might be declared that, after the deaths of the several persons to whom the personal estate was bequeathed after her death, such personal estate was undisposed of; and that she, Lady Anne Conolly, together with such other persons as were the next of kin of the testator at the time of his death, were entitled to the whole of such personal estate as was undisposed of by the will and codicils.

The respondent George Byng, by his answer to the bill, insisted that he, as the eldest son of George Byng, of Wrotham Park, was entitled to the whole personal estate of the testator, subject to the life-interest therein of Lady Anne Conolly, and to the legacies and annuities directed by the will and codicils.

By the decree made by the Master of the Rolls in 1793, it was referred to the Master to take the usual accounts, and to inquire who were the next of kin of the testator at his death;

and it was ordered that the personal estate, not specifically bequeathed, should be applied in payment of the debts, &c.; and it was, among other things, declared that Lady Anne Conolly would be entitled to the interest of the clear residue of the testator's personal estate during her life.

After the pronouncing of that decree, H. S. Conway, one of the executors and defendant in the cause, died; and by an order of the 27th of February, 1796, the suit was revived against the Dowager Countess of Ailesbury, his widow and executrix.

On the 7th of March, 1796, the Master made his report, in pursuance of the said decree and of the said order of

revivor, and certified the particulars therein contained relative to the personal estate of the testator, and the rents and profits of his freehold and leasehold estates, &c.; and he found, among other things, that Lady Anne Conolly, being the sister of the testator, was one of his next of kin; and that the several other persons therein mentioned were the other next of kin of the testator at his death.

By a subsequent order made in the cause, in May, 1796, the testator's personal estate was ordered to be brought in, and to be invested in the 3 per cent consolidated bank annuities, and the interest of the surplus, after providing for the growing payments of the annuities, &c., to be paid to Lady Anne Conolly during her life; and that on her death, any person entitled thereto should be at liberty to apply to the Court concerning the same.

Lady Anne Conolly died in 1797, and the suit was revived by her executors, Sir W. Howe, Hugh Hoare, and others. (a) It appeared from the Master's subsequent reports, and from decrees and orders of Court, that the fund arising from the testator's estate, and * vested in the 3 per * 514 cent consols, in the year 1806 exceeded 307,000*l.*, the interest of which has been regularly paid to the respondent George Byng, according to the said decrees and orders, "without prejudice to his claim to the capital."

The suit having afterwards become abated by the deaths of parties from time to time, was as often revived by various orders of the Court.

In June, 1841, the respondent G. Byng filed a bill of revivor and supplement, which was amended in February, 1842, against John Baron Strafford, formerly John Byng, the respondent's next brother, and against the then personal representatives of the testator and of Lady Anne Conolly and the other next of kin of the testator, praying that it might be declared that, under the bequests contained in the said will and codicils, he, the respondent, became upon the death of Lady Anne Conolly absolutely entitled to all the re-

(a) See *Howe v. Earl of Dartmouth*, &c., 7 Ves. 137.

siduary personal estate of the said testator, then (in 1842) amounting to 375,156*l.* 3 per cent consolidated bank annuities, besides other sums standing to the credit of the causes; and that the said sum and sums might be ordered to be transferred to him accordingly.

The defendants having put in their answers, the Master of the Rolls, on the hearing of the causes in June, 1842, made an order of reference to the Master to inquire and state who were the next of kin of the testator at his death, and who were the personal representatives of such of them as died since. The Master, in pursuance of that order, made his report in July, 1842.

The causes came afterwards to be heard before the Master of the Rolls upon the said report, and upon a
 • 515 • petition presented by the respondent, stating and praying to the same effect as his said bill. The representatives of the next of kin of the testator resisted the respondent's claim, insisting that the several persons to whom the testator had bequeathed his personal estate after the death of Lady Anne Conolly were entitled only to life-interests therein, and that the capital, being undisposed of, became after their deaths divisible among the testator's next of kin.

The Master of the Rolls, by his decree, (*a*) dated the 31st of January, 1843, declared that the respondent George Byng, under the bequests contained in the said will and codicils, became upon the death of Lady Anne Conolly, and then (at the date of the decree) was, absolutely entitled to all the residuary personal estate of the said testator, subject to such charges as are still subsisting upon or affecting the same, and the same was ordered and decreed accordingly; and it was further ordered, that the residue of the sum of 376,106*l.* 19*s.* 6*d.* bank 3 per cent annuities, standing in the name of the accountant-general in trust in the causes, — after payment of costs of all parties, — not having any subsisting charge or incumbrance affecting it, should be transferred to the said respondent.

(*a*) See his Lordship's judgment, 5 Beav. 564.

The personal representatives of Lady Anne Conolly and of the other next of kin of the testator appealed against that decree.

Mr. Kindersley and *Mr. Turner* (with whom was *Mr. E. J. Lloyd*), for the appellants.— The appeal is confined to the personal estate, and the question is, whether Mr. George Byng is entitled to it absolutely, * or for his * 516 life only. The Master of the Rolls held that he took the absolute interest. The decrees and orders made in the administration suit of Lady Anne Conolly against the Earl of Dartmouth did not affect this question; they directed the various funds constituting the testator's estate to be paid into Court and to be vested in consols, and the interest thereof, after setting apart sufficient sums to answer the growing payments of the annuities bequeathed by the testator, to be paid to Lady Anne Conolly for her life, with liberty to any person entitled thereto on her death to apply to the Court concerning the same. There was no adjudication respecting the capital. So again, on the death of Lady Anne Conolly in 1797, the order made in the suit revived by her executors (*Howe v. Dartmouth*) directed the further payment of legacies and annuities, and the interest of the residue of the capital to be paid to Mr. Byng; but without prejudice to his claim to the capital. By an order made in that cause, on rehearing by Lord ELDON in 1802, it was ordered that the interest and dividends of the fund should be paid to Mr. Byng; "and after his decease, any persons entitled to the principal and interest of the residue of the testator's estate were to be at liberty to apply to the Court concerning the same." Mr. Byng's claim to the principal existed from the year 1797, but his right has never been admitted by any order or decree in the causes before the decree now under appeal.

The will and codicils are most inartificially drawn; no doubt they were all written by the testator. They show on the face of them an intention and desire that the estate, both real and personal, should go to the different persons named, in succession, and for their respective lives only. In order

* 517 to carry out the * testator's intention, your Lordships will, in the first place, endeavour to put such construction on the will as shall give effect to all the words of it, or, at all events, to most of the dispositions in it; and secondly, if your Lordships find an intention clearly expressed, you will not put such construction on other parts of the will as shall have the effect of defeating that clearly expressed intention. These are the elementary rules applicable to the construction of wills. If a man devise all his lands to A., B., C., and D., in succession, the effect of such a devise is that all these persons take life-estates only; so also, in a similar disposition of land and personal estate, it is not to be held that any one of them shall take it absolutely.

[LORD CAMPBELL. — It is quite clear that in such a devise of lands, each person only takes for life: how do you show that the same rule applies to personal estate?]

It is necessary to consider that mode of disposition as applicable to each species of property. There is no doubt as to its application to realty. An argument was raised in the Court below on a distinction between "lands" and "estate;" and it was argued that the latter word was sufficient to pass the fee in realty, and therefore that when the testator gave all his "personal and landed estates" to the eldest son of George Byng, that was an absolute gift of the personalty, unless it is shown to be cut down to a life-estate by some other clear expressions in the will. There is no true foundation for that argument. The whole clause must be considered together. Admitting that the word "estate" may pass the fee in lands, we submit that in some combinations of terms it

may not pass the fee. The word "estate," as used by * 518 this testator, does not describe the quantity of * interest he had, but the property itself; by the words "all my landed estates," he did not mean "all my real estate." He uses technical terms capriciously and inartificially all through the will and codicils. The first devise he makes, after that to his wife, is to Lady Conolly, expressly for her life; "and then to the eldest son of George Byng,

and afterwards to his second, third, or any later sons he may have by my niece Anne ; and then to the eldest son and other sons, successively, of the Earl of Buckingham by my niece Caroline." It is most consistent with the whole will to hold all these to be gifts for life in succession, and any other construction will contravene the intention of the testator. It is material to see what the Judges said in the case of *Whitlock v. Heddou*, (a) — which is cited only for the value of their opinions given upon a case sent by the Lord Chancellor to the Court of Common Pleas. Chief Justice EYRE says, (b) "As to the argument that a fee is conveyed to the sons of J. W. by the word 'estates,' I take the rule to be, that it may convey a fee, if the Court sees in the whole context of the will that the testator intended that it should do so ; but that in its strict technical sense it does not convey a fee:" and Mr. Justice BULLER says, "The first question here will be on the sense of the word 'estate,' as used in this will. There are many cases in which this word has received different interpretations: *noscitur a sociis*; look to the words which accompany and are connected with it: now, if the word 'estate' will not pass a fee in this case, the whole dispute with respect to the freehold is at an end." Mr. Justice HEATH says, "The word 'estate' must be construed * according to the context. It may give an estate for * 519 life, in tail, or in fee, according as the intention of the testator appears:" and Mr. Justice ROOKE says, "The word 'estate' or 'estates' may or may not give a fee-simple, according to the context. There is no expression in this will to show that it was the testator's intention to describe by the word 'estates' the quantity of interest he was to pass, but only the premises."

It is true that by the use of the words "all my estate" in a will, the whole interest passes from the testator, but may not all go to the first taker absolutely ; the whole estate passes out of the testator to the devisees all together, but not absolutely to any one of them. If the words "for life" were left out of the gifts to the Countess of Strafford and Lady

(a) 1 Bos. & Pul. 243.

(b) 1 Bos. & Pul. 247.

Anne Conolly, still each would take only a life-estate in the personalty. The testator uses technical words at random in respect of the personalty; saying in the first codicil, "those that inherit my personal estate," &c.; and in the twelfth, "my heir to my personal estate," &c.: so that the will cannot be construed according to the technical meaning of the terms used, but the intention is to be collected from the whole context; and the words "and afterwards," and "and then," and again "and afterwards," indicate a clear intention that the several gifts were gifts to the several persons named for life in succession, and to no one of them absolutely.

[THE LORD CHANCELLOR. — The gifts to the Countess of Strafford and Lady Anne Conolly are expressed to be "for life;" why should not the testator use the same expression in the gift to the eldest son of George Byng, if he meant to give him only a life-estate?]

And if he meant to give him an estate in fee, he
 * 520 * would have used such words as he did in the eighth codicil, in devising a freehold estate to his footman: "which estate I leave to him and heirs for ever;" showing that he knew how to devise a fee. There is no estate given absolutely to the eldest son of George Byng. The case of *Awse v. Melhuish* (a) is applicable to both branches of the question. There a testator gave all his estates and effects, freehold and leasehold, to certain persons successively for their respective lives, remainder to two other persons "during their joint lives, and to the survivor of them." Lord Chief Baron EYRE, sitting for the Lord Chancellor in the Court of Chancery, held that only a life-estate in the freehold passed to the survivor of those two; observing that the testator meant by the use of the words "all my estates and effects," no more than a description of the subjects of the devise, not the interest devised; and that the express limitations for life in the prior devises showed that the intent was to give a life-estate only to the survivor. These observations apply forcibly

(a) 1 Bro. C. C. 519.

to the present case. The consequence of the construction put on this will by the Court below would be, that if the eldest son of George Byng died in the lifetime of the testator, the testator should be held to have died intestate, except as to the prior life-estates to his wife and Lady Conolly.

[THE LORD CHANCELLOR. — All the codicils are anxiously expressed to pay the legacies and annuities.]

Yes, all the estates were to be forfeited on non-payment by the different takers; but it is not therefore to be inferred that a fee was given to any of them; those to whom life-estates were expressly given were to forfeit them. Where a testator has *distinctly pointed out a suc- * 521 cession of takers without any words of limitation of the fee, to hold that he gave the fee to any one destroys the succession.

[THE LORD CHANCELLOR. — If a testator gives all his personal estate to A. it is an absolute gift, subject, however, to be cut down or defeated by other words in the will. But the person contending against such absolute gift must show the words by which it is so cut down. It is not to be questioned that if a person gives his real and personal estate to A. without more, A. takes the personal estate absolutely, but not the real estate without the addition of heirs, or for ever, or other words showing an intention to give an absolute estate. If real estate is given to A. and his heirs, and afterwards to B. and his heirs, this latter gift does not cut down or affect the estate given to A. and his heirs.]¹

But if you give personalty to A. and afterwards to B. and afterwards to C., these all only take life-estates in succession.

[LORD COTTENHAM. — Is there any case where that has been decided?]

¹ See *Hawley v. Northampton*, 8 Mass. 37; 1 *Jarman Wills* (4th Am. ed.), 677, note (2); *Burbank v. Whitney*, 24 Pick. 154, 155; *Ide v. Ide*, 5 Mass. 500.

The word “ afterwards ” means after the former estate.

[LORD COTTENHAM. — But the “ afterwards ” may never arrive.]

There is no case in which it was held that when personalty is given to A. and afterwards to B., and then to C., &c., A. takes an indefeasible interest. It was not, indeed, argued in the Court below, nor will it here, that Mr. Byng took an indefeasible interest in this property, but that he took it subject to the performance of the conditions imposed by the will and codicils on the several devisees and legatees taking in succession. It would appear by the Master
* 522 * of the Rolls’ judgment that he conceived that the burdens and charges imposed on the property by the testator indicated his intention to give it absolutely. That inference does not necessarily arise ; the conditions are not that the legatees shall pay the charges, but that they are to be paid out of the property given to them, or it is to be forfeited by the person in possession, and to pass to the next taker specified in the will.

Upon the authority of the case of *Awse v. Melhuish*, before referred to, and the recent case of *Doe v. Lean*, (a) it is submitted that the testator’s intention in the use of the words “ all my personal and landed estates,” was to describe the nature of the estates, and not the quantity of interest given.

The Solicitor-General and *Mr. Romilly* appeared for the respondents, but were not called on.

THE LORD CHANCELLOR. — The material part of the will, on which the question turns, is extremely short: “ I also leave to my wife, Anne Countess of Strafford, all my houses, gardens, parks, and woods, and all my landed estates, for her life ; and afterwards all my personal and landed estates to my eldest sister Lady Anne Conolly, for her life ; and then to the eldest son of George Byng, Esq. of Wrotham Park ; and

(a) 1 Ad. & El. 229 (new series).

afterwards to his second, third, or any later sons he may have by my niece Anne, Mrs. Byng, and then to the eldest son and other sons successively of the Earl of Buckingham by my niece Caroline."

It was argued by the counsel for the appellants, and very properly argued, that as to the first clause, " I also leave to my wife, Anne Countess of Strafford, all * my houses, * 523 gardens, parks, and woods, and all my landed estates for her life," the words " landed estates " are a mere description of the property, and do not denote the quantity of interest; and therefore they argued, and I think fairly argued, that, in the next passage, " and afterwards all my personal and landed estates to my eldest sister Lady Anne Conolly, for her life," the words, " landed estates " have exactly the same meaning, and that, therefore, again they have the same meaning as applicable to the gift to " the eldest son of George Byng, Esq., of Wrotham Park ; " and the learned counsel then come to this conclusion, that as there are no words of inheritance, this gift, as far as the landed estates are concerned, carries only an estate for life. They then follow that conclusion up by this argument. But before I proceed to that, I should state, with respect to the personal estate, that when the testator conveys his personal estate, he conveys *all* his personal estate to Lady Anne Conolly for life, and then to the eldest son of George Byng, Esq., of Wrotham Park. Those words require no addition of words of inheritance, as regards the personal estate. The personal estate by those words would pass absolutely; therefore, although the real estate might be an estate merely for life, the words are clearly sufficient to pass the personal estate absolutely. Then the learned counsel make use of this argument: they say it was intended that the real estates and the personal estate should go together to the same person, and be vested always in the same person; and as the real estates are only estates for life, therefore (they say) the personal estate must also be considered as an estate for life. But the real estates are estates for life, merely because no words of inheritance have been added; and it does not follow, that * because by that omission * 524 there is a failure of the object, the personal estate is

an estate only for life. That argument, therefore, has no weight. It appears to me that the circumstance of the real estates being only estates for life, in consequence of the omission to add words of inheritance,¹ the object which the testator is supposed to have in view; namely, that the personal estate and the real estates should go to the same persons, has on that account failed, and therefore no inference can be drawn from that circumstance.

But then it is said that, though by the words "then to the eldest son of George Byng, Esq., of Wrotham Park," if they stood alone, an absolute estate would be conveyed, yet that the additional words "and afterwards to his second, third, or any later sons that he may have by my niece Anne," alter the nature of the estate. I do not understand how they alter the nature of the estate. The personal estate is absolutely given by the most distinct words to the eldest son of George Byng, Esq., of Wrotham Park. If an absolute estate is given to him by those words, it does not follow that any alteration is made in that estate, because, after the termination or supposed termination of that estate, which can in point of law have no termination, another disposition of the property immediately afterwards is made; therefore I do not think that that argument at all applies. An absolute estate is given, and the will adds, that after the expiration or termination of that estate, then some other person shall take. That estate never does terminate: then there is no other person that can take it.

It is material to observe, that in the two former dispositions, when the testator intends to give estates for life, estates for life are in terms given; they are not in a remote
 * 525 part of the will, but in the clause * which immediately precedes; an estate for life is in terms given to the

¹ See 2 Jarman Wills (4th Am. ed.), 125, note (2), and numerous cases cited; *Wait v. Belding*, 24 Pick. 133; *Cook v. Holmes*, 11 Mass. 531; *Josselyn v. Hutchinson*, 21 Maine, 340; *Newton v. Griffith*, 1 Harr. & G. 111; *Wright v. Denn*, 10 Wheat. 204; *Lummus v. Mitchell*, 34 N. H. 39, 45. But if the will disclose a manifest intent of the testator to give a fee, a fee-simple estate will pass without words of limitation. See 2 Jarman Wills (4th Am. ed.), 125, note (2), and cases cited; 2 Kent, 7.

Countess of Strafford, and an estate for life is in terms given to Lady Anne Conolly; and then there is this disposition of the property immediately afterwards, to the eldest son of George Byng, and it is given to him without any limitation as to its being an estate for life: that being an absolute estate, the disposition after the termination of that estate is an absolute disposition of a nonentity, and is altogether void, and appears to me to have no effect whatever. Therefore, I think, under these circumstances, that the decision of the Court below must be affirmed.

LORD BROUGHAM. — I entirely agree in the view which my noble and learned friend has taken of this case. In the first place, it is not immaterial to observe, that when this testator clearly meant to give a life-estate, he leaves no doubt whatever about it; he gives to his widow for her life; he gives to his sister for her life; and there is no question which can be raised whether or not to those two devisees and legatees he intended an absolute interest or life-estate. Then immediately and in succession following those two devisees and gifts in terms for life come these words: and they are not “then and in the same manner,” or “and then in like manner,” or “and then and also likewise,” which might raise some doubt; but, as if he were addressing himself to a totally different subject-matter, he addresses himself to a totally different party; namely, the son of his niece, Lady Anne Conolly’s daughter, his own great-nephew; he then gives it in the words which have raised this controversy, respecting which one is only surprised, considering the vast sum at stake, that half a century should have been suffered to elapse by the respondent * remaining in calm contentment, without taking * 526 the opinion of the Court, as has been done by this convenient proceeding: “And then to the eldest son of George Byng, Esq., of Wrotham Park; and afterwards to his second, third, or any later sons he may have by my niece Anne.”

Now it is quite clear that “then” must refer to the verb and the substantive before; that is to say, “I leave to my wife all my houses, gardens, parks, and woods, and all my

landed estates, for her life ; and afterwards all my personal and landed estates to my eldest sister, Lady Anne Conolly, for her life ; and then to the eldest son of George Byng, Esq., of Wrotham Park." Here he is making a gift out and out of his whole personal estate, — and we are now only considering the question as to the personal estate. He gives his whole personal estate out and out to Mr. George Byng's eldest son ; that is perfectly clear ; and if he (the eldest son) had predeceased the testator, it would have been a gift also to his brother next in succession, him surviving.

But then, as it is quite clear the decision would be against the appellants if you were only to read this phrase, stopping at the words " Wrotham Park ;" in order to make it appear that that gift is qualified or retracted, as it were, but at all events restricted by what follows, they (the appellants' counsel) take in the words next immediately following ; that is to say, " and afterwards to his second, &c., sons." Now I do not think it ever was decided — I am not aware that it has ever been contended — that a gift of an absolute interest, followed by a gift to another person of the same absolute interest, restricts the first absolute interest to a life-estate by

combining the two clauses of gift together, as if they
 * 527 formed one gift ; whereas they * form, in fact, two gifts ; first, to George Byng's eldest son, the first taker, and after him to the second son. I therefore consider that this is neither more nor less than that which the Master of the Rolls has decided, — a fee first given, and then mounting on that another fee ; that is to say, an absolute interest in the personalty given to the eldest son of George Byng, and subsequent to that, and not as parcel of that gift, in which case it might qualify it, but subsequent to that, an attempt to give to G. Byng's second son that which it was impossible to give, namely, that which remained, after the whole was exhausted by the gift to Mr. G. Byng's eldest son. Now what remained ? Nothing, as has been observed by my noble and learned friend, nothing whatever remained ; because the first gift is to the eldest son of George Byng of the whole, and the whole being exhausted by that gift, nothing whatever remained.

I entirely leave out of view, in my judgment, two things.

In the first place, I leave out of view all that is said respecting the charges ; and why ? Because some little doubt may exist on the argument as to the charges ; first, as to whether they were charges on the real estate, in which case they would not operate to enlarge the fee, or whether they were charges on the personal estate, in which case they would operate to enlarge the fee. I hold it to be quite immaterial to go into that, because that is by no means so clear as the construction of the clause of gift itself ; and I have no occasion to seek for a worse argument, when I think I have a better argument to resort to. The other thing which I purposely leave out of view is, whether or not my opinion would be the same with respect to the real estate ; and I purposely leave that out of view ; for this reason, because it is not necessary * to decide one way or the other as to * 528 the realty. We are here only on the personalty ; we can only be here as to the personalty. The real estate being affected by no trust, there is no possibility of taking the opinion of a Court of Equity upon it ; consequently until an ejectment is brought on the decease of Mr. George Byng, — which I hope will be at a very distant period, — there is no chance of that question being tried at law. But I must say that I do not wish to be understood to be clearly of opinion — very far from it — that this is an estate for life of the realty, any more than an estate for life of the personalty. I am not called upon to give an opinion upon that, but if I were to give an opinion, I am not at all clear that I should not give it in the same way with respect to the realty as I do with respect to the personalty. But why should I enter upon that ? The argument in respect of the realty may be rested on totally different grounds from any that we have with respect to the personalty ; and therefore, for both those reasons, there is no necessity for our deciding that question.

Last of all, I shall just mention two cases which have been cited by the learned counsel, — *Awse v. Melhuish* (a) and *Doe v. Lean*, (b) — cases more wide of the present could hardly be cited, in my opinion, than those. [His Lordship having

(a) 1 Bro. C. C. 519.

(b) 1 Ad. & El. (N. S.) 229.

stated the points disputed in both cases, observed as to the latter:] Now that case is so clear that one wonders that it should ever have been disputed. There are no words, or any thing like words, of inheritance. The words are, "an estate called L., in the parish of B.;" any thing more completely showing that "estate" there means a close or a piece of land called L., in the parish of B., cannot be conceived;

* 529 no man's * estate or quantity of interest is called "L., in the parish of B.;" it refers to a particular parcel of land which is situate in the parish of B., and so named; consequently that was the subject of that gift. Afterwards it was said the same shall go so and so; and the word "same" must no doubt refer to the last antecedent; namely, "an estate called L., in the parish of B.;" therefore the argument, resting on the general use of the word "same," could only rest on the omitting all this, and substituting the word "same;" the same estate, if it had been the same estate in the will, that might have been sufficient to pass a fee, but that was not the meaning of the word "same;" the meaning of it was the estate L. before mentioned, in the parish of B.

For these reasons, considering that those cases really have no application whatever to the present, I entirely agree with my noble and learned friend that this judgment is well grounded; and without entering into all the argument, I think it sufficient to say that in my opinion the Master of the Rolls has taken a correct view of this case; for he expressly states that it is impossible in law to give to A. a right to a thing out and out,—to give the absolute interest in that thing, and then afterwards to restrict that absolute gift by a limitation over. That would be attempting to do that which is impossible,—to limit the fee which is given in the first instance. Observing merely, therefore, that the grounds on which we have to proceed appear to be the same on which the Court below pronounced the decision, I am entirely of opinion with my noble and learned friend that the judgment ought to be affirmed.

LORD COTTENHAM. — I am also of opinion that this
* 530 * judgment ought to be affirmed; and that, in the ordi-

nary meaning of the words which are used in the will, they are clearly sufficient, taken by themselves, to convey an absolute interest; and I do not find in any of the other testamentary papers any sufficient reason to give any other construction to those words than that which is the clear and proper meaning of them. The two estates are joined, and one argument was that there was an intention on the part of the testator that they should go together. Beyond all doubt, that was his intention; but the same rule not being applicable to real estate which is applicable to personal estate, the intention clearly enough expressed upon the face of the will is not capable of being carried into effect. Now, for instance, supposing the arguments which have been used on the part of the appellants were correct, and the word "estate"¹ meant a mere description of the property, then there being no words descriptive of the extent of interest, and no words of inheritance, if that be the construction put on the will, the consequence would follow of taking the real estate out of that course in which the testator evidently intended it should go. That does not apply to the personal estate at all, no words of inheritance being necessary; and the same reason would not operate on the construction of the will with reference to the personal estate as with reference to the real estate. The question as to the real estate not being before us for consideration, I do not express any opinion upon it, further than to say that the failure of the testator's intention as to the real estate furnishes no ground for coming to a conclusion that the same consequence must follow as to the other part of the disposition, which relates to the personal estate.²

Now, I am dealing with the personal estate, and I
* find it given to two persons for life specified, and * 531
then the words used, "and then to the eldest son of George Byng." The words "then" and "afterwards," which are used in this will, seem to be used with the same meaning; where they have an antecedent, there is no diffi-

¹ See 2 Jarman Wills (4th Am. ed.), 133, note (2), and cases cited.

² See the remarks of Mr. Justice BIGELOW, in *Hall v. Priest*, 6 Gray, 21-23; *Hawley v. Northampton*, 8 Mass. 38, 39; *Ex parte Wynch*, 5 De G., M. & G. 225, 226.

1843.

THE QUEEN *Plaintiff in Error.*
 GEORGE MILLIS *Defendant in Error.*
 AND
 THE QUEEN *Plaintiff in Error.*
 JAMES CARROLL *Defendant in Error.*

Canon Law. Marriage.

A., a member of the Established Church in Ireland, went, accompanied by B., a Presbyterian, to the house of C., a regularly placed minister of the Presbyterians of the parish where C. resided, and there entered into a present contract of marriage with the said B.; the minister performing a religious ceremony between them, according to the rites of the Presbyterian Church. A. and B. lived together for some time as man and wife; A. afterwards, B. being still alive, married another person, in a parish church in England. *Quære*, whether the first contract, thus entered into, was sufficiently a marriage to support an indictment against A. for bigamy?¹

¹ See *Catherwood v. Caslon*, 13 M. & W. 261, 266 and note; *Beamish v. Beamish*, 9 H. L. Cas. 274; s. c. 5 Irish C. L. 136; *Du Moulin v. Druitt*, 13 Irish C. L. 212. The rule upon this subject, as stated by Chancellor KENT, is, that "if the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve; and it is equally binding as if made *in facie ecclesiæ*." 2 Kent, 87. See *Bissell v. Bissell*, 55 Barb. 525; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Commonwealth v. Stump*, 53 Penn. St. 132; *Patterson v. Caines*, 6 How. (U. S.) 550; *Hallett v. Collins*, 10 How. (U. S.) 174; *Jewell v. Jewell*, 1 How. (U. S.) 219; *Clayton v. Wardwell*, 4 Comst. 230; *Londonderry v. Chester*, 2 N. H. 268; *Parton v. Hervey*, 1 Gray, 119, 122; *Milford v. Worcester*, 7 Mass. 48; *Ligonia v. Buxton*, 2 Greenl. 102; *Cheney v. Arnold*, 15 N. Y. 345; *Duncan v. Duncan*, 10 Ohio St. 181; *Johnson v. Johnson*, 30 Mis. (9 Jones) 72; *Van Tuyl v. Van Tuyl*, 57 Barb. (N. Y.) 235; *Loring v. Thorndike*, 5 Allen, 269.

LORD BROUGHAM, LORD DENMAN, and LORD CAMPBELL, were of opinion that it was : the Lord Chancellor, Lord COTTENHAM, and Lord ABINGER, were of opinion that it was not. The Lords being thus divided, the rule “semper præsumitur pro negante” applied, and judgment was given for the defendant in error.²

Practice.

It is an inflexible rule of the House to hear only two counsel for each party in any one case ; and the House will not avoid the effect of this rule by permitting one senior and one junior counsel to be heard in the opening, and a third counsel to reply.

February 13, 14, 16, 17 ; July 7 ; August 10, 11, 1843. February 23 ; March 29, 1844.

At the spring assizes of 1842 for the county of Antrim, the defendant in error, Millis, was indicted for bigamy, under the Statute 10 Geo. 4, c. 34. He was arraigned upon this indictment, and pleaded not guilty, and thereupon issue was joined. The jury found the following special verdict : “That in the month of January, 1829, George Millis, accompanied by Hester Graham (spinster), and three other persons, went to the house of the Rev. John Johnstone, of Banbridge, in the county of Down, the said Rev. John Johnstone then and there being the placed and regular minister * of the congregation of Protestant dissenters com- * 535 monly called Presbyterians, at Tullylish, near to Banbridge aforesaid ; and that the said prisoner and the said Hester Graham then and there entered into a contract of present marriage, in presence of the said Rev. John Johnstone and the said other persons, and the said Rev. John Johnstone then and there performed a religious ceremony of marriage between the said prisoner and Hester Graham,

² Where the Judges of a Court of error or appeals are equally divided upon the question of affirming or reversing the judgment rendered in the lower Court, the judgment of the Court below is affirmed. *Etting v. Bank of the United States*, 11 Wheat. 59 ; *Baker v. Lee*, 8 H. L. Cas. 495 ; *Dansey v. Richardson*, 3 El. & Bl. 144 ; *Brown v. Aspden*, 14 How. (U. S.) 25 ; *Guild v. Guild*, 15 Pick. 129 ; *Durant v. Essex Company*, 8 Allen, 103 ; s. c. 7 Wallace, 107 ; *Hickman v. Cox*, 3 C. B. (N. S.) 523, 568 ; *Jewell v. Jewell*, 1 How. (U. S.) 219, 234, and many other cases cited in *Northern R.R. v. Concord R.R.*, 50 N. H. 176 and note.

according to the usual form of the Presbyterian church in Ireland; and that after the said contract and ceremony, the prisoner and the said Hester for two years cohabited and lived together as man and wife, the said Hester being after the period of said ceremony known by the name of Millis. And the jurors aforesaid, upon their oath aforesaid, further say that the said George Millis was, at the time of the said contract and ceremony, a member of the Established Church of England and Ireland, and that the said Hester was not a Roman Catholic, but the jurors aforesaid do not find whether she, the said Hester, was a member of the said Established Church or a Protestant dissenter. And the jurors aforesaid, upon their oath aforesaid, further find, that afterwards, upon the 24th day of December, 1836, and while the aforesaid Hester was still living, the said George Millis was married to one Jane Kennedy, then spinster, in the parish of Stoke, in the county of Devon, in England, according to the forms of the said Established Church, by the then officiating minister of the said parish, he being then and there a priest in holy orders; but whether," &c.

The indictment and special verdict were afterwards removed by *certiorari* into the Court of Queen's Bench in Ireland, and the case was argued there in Easter term, 1842.

* 536 * The Judges of the said Court afterwards delivered their judgments *seriatim* on the said case: Mr. Justice PERRIN was in favour of the validity of the first marriage, even as a marriage *per verba de præsenti*, and consequently of the conviction: Mr. Justice CRAMPTON thought it a valid marriage, but only so as being celebrated by a Presbyterian clergyman: Mr. Justice BURTON thought the marriage invalid in every way; and with that opinion Lord Chief Justice PENNEFATHER entirely concurred. (a)

Afterwards, and for the purpose of obtaining the judgment of this House, Mr. Justice PERRIN in form withdrew his judgment; and thereupon the said Court adjudged that the

(a) See "Report of the Cases of Regina v. Millis, and Regina v. Carroll, in the Queen's Bench in Ireland, in Easter and Trinity Terms, 1842; by Edmund Spencer Dix, Esq., Barrister-at-Law; Dublin."

said George Millis, the now defendant in error, was not guilty of the felony in the indictment charged against him, and he was thereupon acquitted.

This writ of error was then brought, and now came on for argument, in the presence of Lord Chief Justice TINDAL; Justices PATTESON, WILLIAMS, COLEBRIDGE, ERSKINE, CRESSWELL, and MAULE; and Barons PARKE, ALDERSON, and ROLFE.

The Attorney-General applied to the House to permit the hearing of counsel in the following manner: He proposed to address the House in the first instance, and requested that *Mr. Waddington* should be permitted to follow; and that after the counsel for the defendant in error had been heard, the Solicitor-General should be allowed to reply.

THE LORD CHANCELLOR. — We cannot do that; it is contrary to our rule. The House can only hear two counsel. If the Solicitor-General is to be heard, he must address the House in the first instance.

The Attorney-General then addressed the House for * the plaintiff in error. In Argument. * 537 the first instance, he addressed himself to the case of Carroll, in which the ceremony of marriage had been performed by a Presbyterian minister not having any pastoral charge; but he was desired by the House to take the case of Millis as that to which his argument was to be directed, as one in which the question of the validity, in Ireland, of a marriage *per verba de præsenti*, and the validity of a contract of marriage made in the presence of a regularly placed minister of the Presbyterian church, could be respectively considered. Having stated the circumstances of the case, he said: There is a sufficient marriage *de facto* in this case to sustain this indictment. The first authority to be referred to is that of Blackstone; his Lectures were delivered in 1753, one year before the passing of the Marriage Act. His declaration of what was then the law is extremely strong: he says, (a) “ Our law considers marriage as no other than a

(a) Comm. Bk. 1, c. 15, p. 433.

civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law; the temporal Courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience;" and he puts consent as constituting the substance and essence of the marriage contract. This declaration of the law is fully supported by the authorities there referred to. Bracton, one of those authorities, wrote in the reign of Hen. 3, about the time of the Statute of Merton, which was passed in 1235; and in his 4th Book (*a*) he says: "Ideo de matrimonio videndum de quo sequitur dotis exactio. Et ad hoc sciendum, quod habet quis legitimam concubinam, et ex ea prolem in concubinato, et postmodum contrahit cum eadem clandestinum ma-

* 538 trimonium, et post contractum clandestinum * suscitatur ab ea prolem. Item postmodum contrahit cum eadem publicè et in facie ecclesiæ et dotat eam ad ostium ecclesiæ: In hoc casu erit ille legitimus qui ex clandestino matrimonio natus fuerit, dum tamen hoc probetur, et hæreditatem obtinebit. Et ille qui post solemnitatem progenitus fuerit (quavis legitimus) non erit hæres propinquior quoad successionem, sed mulier propter solemnitatem et dotis constitutionem in facie ecclesiæ dotem obtinebit." And after speaking of marriages contracted in the church, and of marriages contracted not there, but by words of present acceptance or of future promise, followed by a copula; he says, (*b*) "Cum qua legitimè contraxerit ad ostium ecclesiæ vel alibi (dum tamen sponsalia probentur, sive per verba de præsentis sive per verba de futuro, dum tamen carnalis subsecuta fuerit commixtio, erit uxor legitima quantum ad successionem et commodum hæred. et quantum ad dotis exactionem, dum tamen ad ostium ecclesiæ fuerit dos constituta. In clandestino vero matrimonio nunquam dotem consequetur." These passages seem clearly to establish that there was then recognized a clear distinction between a marriage valid for the purposes of succession, and one valid for the purpose of dower. A clandestine marriage would be sufficient for the first; a marriage in the face of the church

(*a*) De Actione Dotis, fol. 302 b.

(*b*) De Actione Dotis, fol. 303 a.

was necessary for the second. It is worthy of note as affecting the question of the validity of his opinion, that writing about the time of the controversy which ended in the Statute of Merton, he says, "A child born before any marriage of any sort is illegitimate, notwithstanding any rites which may be afterwards performed." So that he may be treated as an authority not under any influence of * those opinions against which the Barons entered their * 539 celebrated protest. He lays down the broad proposition that the offspring of a clandestine marriage are legitimate, but that such a marriage will not entitle the wife to dower *ad ostium ecclesiæ*. This distinction is afterwards taken in language the most clear, in a passage under the same head, where, after putting a case of A. and B., he says, (a) "Si illam desponsavit in lecto suo mortali absque aliqua solemnitate, et ibi eam dotavit sicut prædict. talis dicit. Et inquisitionem quam inde feceris scire facias justiciariis nostris literas, &c., &c. Et ita poterit esse matrimonium legitimum, quoad per hereditatis successionem, ubicunque contractum fuerit, dum tamen probatum, et illegitimum quoad dotis actionem, nisi fuerit in facie ecclesiæ contractum, et ibi dos constituta cum solemnitate, quæ tunc adhiberi potest tam tempore interdicti quam alio tempore." This passage, which is decisive on the other point, clearly indicates no necessity at all for the presence of a priest. The *consensus* was all that was required. In Viner's Abridgment, under the heading, "What persons shall be said to be Baron and Feme," (b) the marriage is taken as depending on consent alone, and the age of consent is declared in a manner agreeing with the law of Scotland as it now exists, and also with the civil law. In the same book, and under the same title, the plea of *ne unques accouple en loyale matrimoine* is mentioned; so that the declaration now made is not made in ignorance of, nor without reference to that plea: and under another title (c) it is said, "By the law of the land a man cannot be a bastard after espousals, unless it be by special matter." There can

(a) Bract. de Actione Dotis, 304 a.

(b) Tit. Baron & Feme, C. fol. edit.

(c) Viner's Abridgment, tit. Bastard, B.

* 540 * be no doubt that the word espousals, there used, does not mean a perfect ceremony of marriage according to the rites of the church, but only a marriage contract perfect as to legal validity, which is afterwards perfected as an ecclesiastical matter. In the same work (a) it is said, "The solemnization of marriage was not used in the church before an ordinance of Innocent 3; before which the man came to the house where the woman inhabited, and carried her with him to his house; and this was all the ceremony. *Hutchinson v. Brookbank* (b) and *Haydon v. Gould* (c) are there referred to; and from the citing of these two cases it would appear that the opinion of the writer was, that a marriage might be perfectly valid without the intervention of a priest, provided it was public, that is, that it took place in the presence of witnesses. The presence of a priest was customary, but it was not essential to the validity of a marriage, any more than was the ceremony of giving away the bride. Comyn, in his Digest, (d) says, "ut conjugium subsistat non aliud natura requirere videtur, quam ut talis sit cohabitatio quæ foeminam constituat quasi sub oculis et custodia maris; ad hoc in homine accedit fides quâ se foemina mari obstringit;" and after citing various authorities to the same effect, he adds, "and so by the common law, Co. Lit. 34 a, if it be a contract *per verba de præsentī*, Dy. 369 a; 6 Mod. 155; Sal. 437; Carth. 99:" a mode of stating the doctrine which shows that the Lord Chief Baron held it to be then settled law.

In Bacon's Abridgment, (e) Swinburne is cited, (g)
 * 541 * and it is said, "a contract *in præsentī* or marriage *per verba de præsentī*; as, I marry you; or, You and I are man and wife; is by the civil law esteemed *ipsum matrimonium*, and amounts to an actual marriage which the very parties themselves cannot dissolve by release or other mutual agreement, it being as much a marriage in the sight of God as if it had been *in facie ecclesiæ*; with this difference, that if

(a) Vin. Abr. tit. Marriage, F.

(b) 3 Lev. 376.

(c) 1 Salk. 119.

(d) Tit. Bar. & Fem.; Marriage, B. (B. 1).

(e) Tit. Marriage, B.

(g) Swinburne on Espousals, § 11; Bac. Ab. tit. Marriage, B.

they cohabit before marriage *in facie ecclesiæ*, they are for that punishable by ecclesiastical censures, and if, after such contract, either of them lies with another, such offender shall be punished as an adulterer." Further it is said, "if A. contracts himself to B. and after marries C., and B. sues A. on this contract in the Spiritual Court, and there sentence is given that A. shall marry and cohabit with B., which he does accordingly, they are baron and feme without any divorce between A. and C., for the marriage of A. and C. was a mere nullity. Reeves's History of the Common Law (a) thus treats of the matter: "Matrimony is defined by the canonists in this manner: 'Viri et mulieris conjunctio, individuum vitæ consuetudinem, cum divini et humani juris communicatione, continens.' This union of man and wife was preceded by *sponsalia* or espousals, the nature of which must be first considered before we come to speak of matrimony. Espousals were the promise of a marriage that was to take place, and were divided into espousals *de præsentī*, and espousals *de futuro*." This explains why a man cannot be a bastard if born after espousals between his parents, as stated by Bacon. Reeves goes on thus: "Those of the former kind were considered in the same light as matrimony; so that espousals, properly so * called, were the latter." If that is * 542 accurate, it fully explains the apparent differences between text-writers as to the meaning and effect of espousals. Having laid down that espousals, in his view of the matter, mean a contract *per verba de futuro*, he proceeds to say that the party so espoused or promised might maintain a suit to compel the other party to consummate marriage; indeed, if *concubitus* followed, that alone was sufficient, for then the church said that intercourse between either of these and other parties amounted to fornication. Consummation was necessary after espousals; but, says Reeves, (b) "Espousals *de præsentī* were in effect a contract of marriage;" and he then goes on to explain that "matrimony was divided into *legitimum et non ratum*, and *ratum et non legitimum*, and *legitimum et ratum*;" all which he then proceeds fully to explain.

(a) 4 Reeves, 52.

(b) Vol. 4, p. 55.

He says, (a) "A marriage was said to be *et legitimum et non ratum*, if it was celebrated between Jews and Infidels, and it was called *non ratum* because it might be dissolved by repudiation; whereas marriage among Christians was indissoluble, and was therefore called *ratum*: so that a marriage *ratum et non legitimum* was such as was among Christians without the canonical solemnities; that which was *ratum et legitimum* was a marriage among Christians, attended with all the due canonical solemnities." Swinburne, a great authority on this subject, shows that the securing of witnesses was the great object of the law, and he lays it down broadly that (evidence of the contract being secured) a contract *per verba de præsenti* was fully equivalent to marriage, and he thought that a ceremony before the church was merely necessary to satisfy

* 543 the views * of the churchmen; but that even they never doubted that such a contract was, without the ceremony, a perfectly good marriage. He says, (b) "But that woman and that man which have contracted spousals *de præsenti*, cannot by any agreement dissolve those spousals, but are reputed for very husband and wife in respect of the substance and indissoluble knot of matrimony;" and he afterwards expresses the same thing in as strong terms in another place. (c) In another place, when treating of "public and private spousals," he says, (d) "So careful were the ancient lawmakers to avoid those mischiefs which commonly attend upon secret and clandestine contracts, that they would have the same solemnities observed in contracting spousals which were requisite in contracting matrimony. Private spousals are they at the contracting whereof are omitted some of those solemnities aforesaid, but especially when there be no witnesses present at the contract." He then describes in detail these private spousals, and goes on to say, even of them, that some "hold the contract firm and indissoluble; for the confirmation whereof they allege a very round text extant in the body of the law; the words are these: '*clandestina conjugia contra leges quidem fiunt, contracta tamen dissolvi non pos-*

(a) 4 Reeves, 55.

(b) Treatise of Spousals, § 4, par. 2, p. 13, 4to. ed.

(c) Id. § 11, par. 30, p. 104.

(d) Sect. 14, par. 1, p. 193.

sunt;’ yielding this reason, that, because these solemnities are not of the substance of spousals or of matrimony, but consent only, naked consent is sufficient to make spousals.”

[LORD CAMPBELL. — Do you find any definition of what a clandestine marriage was?]

No satisfactory definition of it exists. There is a great difficulty in * defining it. Some say all marriages * 544 were so considered that were not celebrated in the face of the church; others, all those that were had without witnesses.

[LORD CAMPBELL. — Then there may be a clandestine marriage where there is an interposition of the priest?]

Certainly; there may be a clandestine marriage, according to the first class of these reasoners, even in the presence of the priest, if it is not celebrated in the face of the church. The second supposed excludes that in which the priest is present, for it supposes the contract to be one made between the parties alone. In treating “of the effect of spousals,” the validity of a present contract is most strongly shown. Swinburne there says, (a) “The parties having contracted spousals *de præsenti*, albeit the one party should afterwards marry another person in the face of the church, and should consummate the same by carnal copulation and procreation of children, notwithstanding the first contract is good, and shall prevail against the second marriage.” Nothing can more strongly show the validity of a contract *per verba de præsenti*; for here, even in competition with a regular marriage had in face of the church, this contract is declared to prevail, and even to bastardize the children born under the second marriage. It is decisive to show that the contract is, as all the ancient writers express it, very matrimony itself. In the same page he likewise states, that after a contract *de præsenti*, a contract *de futuro* followed by a *copula* would be

(a) Sect. 17, par. 6, p. 223.

void ; but that must be, of course, when a marriage in the face of the church is void, and children born within it are bastards if a previous contract *de præsenti* is in existence. The 18th section of Swinburne shows the various instances in which spousals *de futuro* may be dissolved ; but he begins that declaration with a statement that “ spousals *de præsenti* are as indissoluble as perfect matrimony solemnized,” which must mean in the face of the church, “ and consummate.” The result of all that Swinburne says is just what Reeves states to be the law of England ; namely, that spousals *de futuro cum copula*, or spousals *de præsenti* without *copula*, are *ipso facto* matrimony in respect of the indissolubility of the contract.

In speaking of the common law of matrimony, it is impossible to forget that this law has sprung up among many nations speaking our language and using our laws ; and we may, therefore, refer to what has been considered the law in some of those nations. In the United States, where the decisions of our Courts have long been quoted as authorities, the rule now contended for has been adopted. In Kent's Commentaries it is said, (a) “ No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required ; and as marriage is said to be a contract *jure gentium*, that consent is all that is required by natural or public law. The Roman lawyers strongly inculcated the doctrine that the very foundation and essence of the contract consisted in consent freely given by parties competent to contract : ‘ Nuptias non concubitus sed consensus facit.’ If the contract be made ‘ per verba de præsenti,’ though it remains without consummation, or if ‘ per verba de futuro ’ followed by cohabitation, it is a valid marriage, and is equally binding as if made in *facie eccle-*

sia. It is considered in the light of a civil contract.

This was the rule of the common law, and also of the canon law which governed England before the Marriage Act.” And for these statements he quotes a whole bead-roll of cases. He goes on thus : “ It is not necessary that a

(a) Vol. 2, § 26, p. 74, § 5.

clergyman should be present to give validity to the marriage, though it is doubtless a very becoming practice, and suitable to the solemnity of the occasion." There are some of the States of the Union where it appears that this law has not been altered. Chancellor KENT mentions the States in which it has undergone alteration, but that was by express provision of the legislature; the law being taken as so clearly settled, that nothing but a direct intervention of the legislature could change it. The same doctrines are stated by STORY in his work on the Conflict of Laws. (a) Such are the opinions of two most eminent lawyers who have written in a country where the old common law of England is still in existence, and must, of course, be the subject of daily experience. There can be no doubt but what they describe to be the law is the same as that which was recognized by our most ancient writers. In Lyndewoode, (b) which was written in 1446, though the book was not published till 1679, it is said: "Matrimonium sicut alia sacramenta cum honore et reverentia, de die et in facie ecclesiæ, non cum risu et joco ac contemptu celebratur. Ne dent sibi fidem mutuò de matrimonio contrahendo, nisi in loco celebri coram publicis et pluribus personis ad hoc convocatis." That is the text; the notes are in the same spirit, showing that publicity and attestation were the purposes required * to be fulfilled. To * 547 *pluribus* there is a note, (c) with these words: "Duo-bus ad minus." In the next section (d) it is said, "Ubi non est consensus utriusque non est conjugium." Then follows an article, "De clandestina desponsatione;" and neither there nor anywhere else, in treating of what is required to constitute a valid marriage, is any thing said of the presence of a priest. After this general description the subject is fully treated in the article "De clandestina desponsatione," but no mention whatever is to be found of the necessity for the presence of the priest: all that is required, it is said, is that there should be witnesses. Upon this subject it may be observed,

(a) Chap. 5.

(b) *Provinciales sive Constitutiones Angliæ*, Bk. 4, tit. 1, p. 271, fol. edit. : "De Sponsalibus et Matrimonio."

(c) Note i.

(d) Page 272.

that Johnston's Ecclesiastical Law, which was published in 1720, and contains the Constitutions of Archbishop Reynolds, first introduces in those Constitutions the word priest; but from the manner in which it is introduced, there can be no doubt that even that ecclesiastical authority, in dictating an ecclesiastical law, did not deem the presence of a priest absolutely necessary to the validity of the ceremony. The Constitution says, "Let matrimony be celebrated as other sacraments, with reverence, in the day time, and in the face of the church, without laughter, sport, or scoff. . . . And let priests often forbid such as are disposed to marry to plight their troth anywhere but in some notable place" [not "the church"], "before [priests or] public persons called together for this purpose, under pain of excommunication." (a) In the Constitution itself the disjunctive *or* is used, as if either priests or other public persons (that is, persons known in the place) might confer by their presence validity on the

* 548 ceremony; and in a note upon it, the learned * author of the work observes, "Priests are not mentioned by Lyndewoode. A contract *in præsenti* was absolutely obliging, as it still is, if made before any two good witnesses; and Lyndewoode, by 'public persons,' understands two such witnesses in any public place." (b) There can be no doubt that the construction thus put upon the Constitution is the correct one. In a note to Stratford's Constitutions, a definition, though not a satisfactory one, is given of clandestine marriage: "A marriage is clandestine, says Lyndewoode, if it be without witnesses, if the bride be not demanded of him at whose disposal she is, and endowed according to law, and if the married couple do not abstain from each other two or three days in honour of the benediction (yet he confesses there is no sin in these omissions), or if it be done without banns."

[LORD CAMPBELL. — The word "benediction" there points to the fact that there was a priest.]

(a) A.D. 1322; Abp. Reynolds's Constitutions, § 7.

(b) Johnston Eccl. Law, A.D. 1343, § 11, note *q*.

It does so ; but then this note appears appended to a Constitution which was promulgated to direct the manner in which the priests should proceed, and it clearly does not assume the absolute necessity of the presence of the priest. In like manner the Constitutions of Archbishop Zouche, (a) though forbidding, under severe penalties, priests to celebrate clandestine marriages, and denouncing those marriages as hurtful to the souls of those who contract them, never once hint that they are invalid.

In Sanchez (b) there is to be found a disputation headed thus : " Quis sit minister sacramenti matrim. an sit sacerdos, ita ut minimè sacramentum esset * ante Tri- * 549 dentinum, celebratum absque sacerdotis presentia."

And his own opinion is most clearly given that consent constitutes the marriage, and that when the parties are thus married without a priest, they must be taken to have administered the sacrament to each other. He thus expresses himself : " Cæterum omnino tenendum est nunquam parochum fuisse, nec post Tridentinum esse ministrum sacramenti matrimonii : et ita ante Tridentinum, clandestinum matrim. fuisse verum sacramentum. Probatur, 1. Quia cum matrimonium sit contractus, nec illius naturam Christus mutaverit, sed tantum elevarit ad esse sacramenti, sequitur aliorum contractuum naturam, quæ est, ut ipsi contrahentes suis consensibus se ligent, nec alios præter ipsosmet contractus afficiat. 2. Quia ante Tridentinum matrim. clandestina erant vera matrimonia, et rata, ut definit ipsum, Trident. Sess. 24, c. 1, de matrim. ergo et vera sacramenta, quia ideo c. Quanto de divor. vers. Nam et si matrimonium, infidelium matrimonium non appellatur ratum, quia sacramentum non est. 3. Quia verba parochi non sunt de essentia matrimonii, sed iis penitus omissus constat matrimonium : ut dicemus lib. 3, disp. 38, n. 4, ergo parochus nullo modo est minister." The conclusion to be drawn from this is, that even in countries where marriage was most strictly a sacrament, the presence of a priest was not necessary. The opinion thus expressed he subse-

(a) Johnston Eccl. Law, A.D. 1347, § 7.

(b) Bk. 2, Disp. 6, p. 121.

quently confirms in another place. (a) Heineccius, another author of great learning and authority in these matters, says: (b) “Quum ergo nuptiæ sint conjunctio consequens est ut consensum utriusque accedere oporteat. Isque
 * 550 consensus solus * jure Romano faciat nuptias, adeoque concubitus domumque deductio ad implementum, instrumenta dotalia ad signum duntaxat, non ad substantiam earumdem, pertineant. Jure canonico tamen connubium non gaudet effectibus ecclesiasticis, priusquam accesserit *ιερολογία*.” It must be admitted that this passage seems to imply the necessity for observing the rites of the church. But he goes on: “Hinc distinctio inter matrimonium legitimum et ratum. Hinc clandestinum habetur matrimonium. Immo Protestantes retinentes *ιερολογίαν*, ne effectus quidem civiles relinquunt nuptiis, sine ritu solemnibus cujusque loci contractis.”

Such are the statements of the text-writers of the greatest authority; and these statements of what was considered to be the law of marriage are amply borne out by the cases decided in our Courts. *Foxcroft's Case*, (c) which is the first, appears to be the other way. It was a case where one R., being ill and in his bed, was married to A., a single woman, by the Bishop of London, privately, in no church nor chapel, nor with celebration of any mass, the said A. being then pregnant by the said R., and twelve weeks after the marriage the said A. was delivered of a son, and he was adjudged a bastard, and the land escheated to the lord by the death of R. without heir. That case is relied on by the other side; but it is of no value, for it was decided, before the passing of the Marriage Act, not to be law. And the same may be said of *Delheith's Case*. (d) This, in fact, was ad-

(a) Sanchez, Bk. 3, Disp. 17, p. 238.

(b) Vol. 5, pt. i.; *Elementa Juris*. Bk. 1, tit. x., § 148.

(c) 1 Roll. Abr. 359.

(d) Rogers's Eccl. Law, 584, cited from the Harl. MSS. 2117. The case is thus stated: Johannes del Heith Katherinam concubinam in domo ipsius Johannis, coram vicario de Plumsted, spontanea voluntate sua affidavit, et annulum digito Katherinæ apposuit, et verba consueta ad matrimonium contrahendum, absque missæ celebratione, pronuntiavit, eo quod propter debilitatem ad ecclesiam accedere non potuit, et ipsam extunc ad totam vitam ipsius Katherinæ pro uxore tenuit: et postea pro-

mitted by * *Mr. Smith*, now Attorney-General for Ire- * 551
land, in his argument for the prisoner in the Court
below, not to be law, for he said: (a) "I admit that after-
wards the strictness which required the celebration by the
priest in church was relaxed, and mere celebration by a priest
was held sufficient." So that, in fact, these two cases must
be considered as removed from the argument. *Gray's Case* (b)
has been cited in the argument below, but it is not important,
for the marriage there was "solemnized in the face of the
church," and the only question as to its validity arose from
the tender age of the youth who was made the husband.
Bunting v. Lepingwell (c) is the next in point of date, and is
a strong authority. There Bunting and Agnes Addingshal
had contracted matrimony *per verba de præsenti*, and after-
wards the said Agnes took to husband Thomas Twede, upon
which Bunting libelled against the said Agnes, on the said
contract, in the Court of Audience, and it was decreed that
Agnes subiret matrimonium cum præfato Bunting, and the
other marriage was declared void. The legitimacy of Bunt-
ing's issue was afterwards disputed, but he was held to be
legitimate, although Twede had not been a party to the pro-
ceedings in the Ecclesiastical Court. Here it appears
that a contract *per* * *verba de præsenti* was treated as * 552
very matrimony in the fullest sense of the word; for
the subsequent marriage of Agnes with Twede was, even
after cohabitation between them, declared null, and she was
compelled to marry, in the face of the church, Bunting, to
whom she had been so contracted; this marriage being re-
quired by the Ecclesiastical Court to give ecclesiastical regu-
larity to a contract which, even as it then stood, that Court
recognized as a perfect marriage. It was contended in the

creavit filium Willielmum ex ipsa Katherina. — Peter, the brother of
John, entered on the lands of which John died seised: the above William
claimed as son and heir of John, and it was inquired whether John had
solemnized his marriage *in facie ecclesiæ*, after he had recovered from his
infirmity; and it being answered that he had not, it was held that Wil-
liam took nothing in the lands, by reason that John had never married
Katherine *in facie ecclesiæ*.

(a) Dix's Rep. 62.

(b) Dyer, 369.

(c) 4 Rep. 29; Moor, 169.

Court below, that as the 58 Geo. 3, c. 81, took away the power of the Ecclesiastical Courts in Ireland to enforce any contract of marriage, this contract could not be considered a good marriage; and the point was put with great force by Mr. Justice CRAMPTON. (a) But the answer to his observations is this: In *Bunting's Case* it is clear that there was an order or decree of the Ecclesiastical Court that Agnes should marry Bunting, and sentence was pronounced without its being deemed necessary to call on Twede to appear, or indeed without taking any step to annul his marriage. It is impossible that the Ecclesiastical Court would have directed her to commit bigamy, which (though the Statute of Bigamy had not then passed) was, as it always had been, an offence in the Ecclesiastical Courts. Again, although there is a statute which now takes away the power of the Ecclesiastical Courts enforcing the performance of such contract, there is none which takes away the power to perform it without enforcement. And if the parties willingly perform the contract, that contract being one *per verba de præsenti*, it is sufficient; for such a contract is very matrimony for all temporal purposes. *Paine's*

* 553 * *Case (b)* occurred in 1660, and a difference of opinion is referred to there; it being said that TWISDEN, Justice, was of opinion that, notwithstanding a contract, the marriage must be solemnized before the parties were complete baron and feme. But the case is of no force either way, for it does not appear what was the sort of contract which existed in that case, or was the subject of consideration. *Tarry v. Browne (c)* was a case depending on circumstances which occurred during the Commonwealth. At that time there were ordinances in force on the subject of marriage: the first took away any necessity for marriage in a church; the second made any other marriage but before a justice void. Of course these ordinances could not be received in the Courts after the Restoration, and that case really depended on the question whether there had or had not been consent on the part of the woman. *Dickison v. Hol-*

(a) Dix's Report, p. 254.

(b) Siderf. 13.

(c) Siderf. 64.

croft (a) is a direct authority for saying that marriage is a civil, not an ecclesiastical matter. *Crosse v. Hunt* (b) is hardly an authority, as that case turned chiefly on the pleadings; but there it seems to have been intimated that words *de præsenti* show an actually executed contract. In *Hutchinson v. Brookebanke* (c) the parties had married by words of present contract before witnesses, in the face of a dissenting congregation, and they were libelled in the Ecclesiastical Court for fornication; but the Court of King's Bench, on these facts being shown, granted a prohibition. It could not be that the marriage in face of a dissenting congregation made it good as an ecclesiastical ceremony, any more than a Quaker's marriage would be good for that reason, but

* that it was a public ceremony, ensuring testimony of * 554 witnesses, which was what the law chiefly required.

The 26 Geo. 2 was passed merely to enforce that principle, by requiring certain forms, which must secure the presence of respectable witnesses, easily to be produced should their testimony become necessary. *Jesson v. Collins* (d) is a very important case; it expresses the deliberate opinion of Lord HOLT, that "a contract *per verba de præsenti* is a marriage;" an opinion which three years afterwards he repeated in *Wigmore's Case*. (e) At a later period *Haydon v. Gould* (g) came before the delegates, and it was there determined that administration ought not to be granted to one who was married by a mere layman; and the letters of administration which had been granted were recalled. This, at first, appears to be in favour of the argument on the other side, but the reason given by the Court makes it a strong authority for the Crown. The reason was, "for that Haydon, demanding a right due to him as husband by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself in this case." The ruling in that case amounted therefore to this, that as the husband had not in his marriage conformed himself to the ecclesiastical law, he should not have the

(a) Keb. 148.

(b) Carth. 99.

(c) 3 Lev. 376.

(d) 2 Salk. 487; 6 Mod. 155; Holt, 158.

(e) 2 Salk. 438.

(g) 1 Salk. 119 b.

authority of that law to assist him in enforcing any claims as husband. But nothing was said in that case to show that for purely civil purposes, for all other purposes but this, the marriage was not a completely valid marriage. The statute there referred to as "confirming marriages contracted during the usurpation," is the 12 Car. 2, c. 33; and though

* 555 sometimes called a declaratory Act, it was in * fact an enacting statute. It is not found in the usual editions of the statutes, as it has long since expired, but in the ancient editions it still exists, and it distinctly enacts that "all marriages had or solemnized" according to the ordinances of the Commonwealth, to which it refers, "shall be deemed of the same force and none other, as if had and solemnized according to the rites of the Church of England." The decision, therefore, in *Haydon v. Gould* cannot apply to this case; but the reason given for that decision is most important, as it completely explains the principle on which many of the authorities relied on by the other side depend.

Scrimshire v. Scrimshire (a) has been commented on in the Court below as possessing a degree of importance beyond what really belongs to it, for it did not depend on any general law of marriage, but on the local law of France. In like manner the observations of Lord MANSFIELD in *The King v. Hodnett* (b) have had attributed to them a weight which they really do not deserve, as applied to this case; but those which he made in *Morton v. Fenn* (c) do appear to deserve consideration. That was an action for a breach of a promise to marry; it was brought long after the Marriage Act had passed. The defendant, who was a man of fortune, had promised to marry the plaintiff if she would go to bed with him; she did so, and afterwards lived with him a considerable time: he several times afterwards repeated his resolution to marry her, but finally married another woman. She then brought her action for damages, and the answer was *turpis contractus*. Lord MANSFIELD is reported to have said: "I thought the objection would not lie, on

(a) 2 Hagg. Cons. Rep. 395.

(b) 1 Term R. 96.

(c) 3 Dougl. 211 (Rose ed.).

* two grounds ; first, that before the Marriage Act * 556 this would have been a good marriage, and the children would have been legitimate by the rules of the common law." It is plain that there must be some mistake here ; for if it was a good marriage, then the action would not have been maintainable ; and if not a good marriage, then the objection *ex turpi causa non oritur actio*, would certainly have been an answer. Still the case is a clear expression of Lord MANSFIELD's opinion on the old law. *Reed v. Passer* (a) is the next case to be considered ; there Lord KENYON rejected the Fleet books, which were offered in evidence to prove a marriage ; but he said, " a marriage in the Fleet, at that time, was good and lawful. I think, though I do not mean to speak meaning to be bound, that even an agreement between the parties *per verba de præsenti* was *ipsum matrimonium*." *Lindo v. Belisario* (b) deserves attention, for this reason, that it is *in pari materia* with *Dalrymple v. Dalrymple*. (c) It occurred sixteen years before that case, and it shows that what was held in *Dalrymple v. Dalrymple* had, sixteen years before, been the settled opinion of the very eminent Judge who decided that case.

[LORD BROUGHAM. — *Dalrymple v. Dalrymple* went through all the Courts. We considered that that decision rested upon two grounds: the first of which was the general law of Europe as to marriage *per verba de præsenti*; the second was the Scotch law. I never heard till now that the opinion of Lord STOWELL, as to what had been the general law of Europe, was obtruded into that judgment.]

In *Lindo v. Belisario* the particular marriage there in question was invalid, because, being set up as a Jew's marriage, it was shown * to have been contracted not in * 557 conformity with the laws of the Jews. The judgment there given was afterwards confirmed by Sir W. WYNNE, (d)

(a) Peake's Ni. Pri. 231, 1 ed.; 303, ed. of 1820.

(b) 1 Hagg. Cons. Rep. 216.

(c) 2 Hagg. Cons. Rep. 54.

(d) 1 Hagg. Cons. Rep. App. p. 4, and see note in p. 9.

who said, "The Marriage Act did not make the marriages of Quakers legal, but they were held entitled to civil rights."

[LORD CAMPBELL. — The last Act does make them legal.]

That is so, and it may be said that that was done because it was found necessary; but that is an unsound line of argument. It was done to prevent the possibility of raising questions at any future period. In *The King v. Brampton*, (a) Lord ELLENBOROUGH held that a contract of marriage *per verba de præsenti* was before the Act a perfect marriage, and he appeared to treat the presence or absence of the priest as a thing wholly immaterial.

[LORD BROUGHAM. — There is a case in which Sir G. HAY struck out from the form of judgment on a marriage case, the words *Presbytero stante* or *presente*. I should like to see that case.

The Queen's Advocate promised to furnish it.]

The Attorney-General continued. — This brings the argument to the case of *Dalrymple v. Dalrymple*. The judgment in that case was pronounced in 1811, and of it nothing more need now be said than this, that it has been read, admired, and approved of by every lawyer in the civilized world, and if entitled to weight and authority, it is decisive of the present question; and with that single observation, it is left to the consideration of the House. What are the cases which followed it? *Elliott and Sugden v. Gurr* (b) is the first, and that decided that a voidable marriage cannot be ren-
* 558 dered void after the death of * either of the parties.

Then followed, and perhaps will be now referred to, *The Queen v. The Justices of Gloucestershire*, (c) which, however, does not seem at all applicable to this case. *Latour v. Teesdale* (d) was the next case, and there the case was most elaborately argued and fully considered; and the Lord Chief

(a) 10 East, 282.

(b) 2 Phill. 16.

(c) 15 East, 537.

(d) 8 Taunt. 830; 2 Marsh. 283.

Justice, in delivering the judgment of the Court, in order that the foundation of that judgment might not be mistaken by any one, abstained from mentioning a fact, found in the case, that there was present at the marriage a person who might be said to be a priest. That judgment was pronounced in 1816, and up to the present time has never been doubted. *Steadman v. Powell* (a) decided that, "As in Ireland marriages may be had without any celebration *in facie ecclesie* or in the presence of witnesses, it would be unreasonable to deny that a marriage had in Ireland may be proved by slenderer evidence than is requisite to the proof of a marriage celebrated in this country." And in the judgment there it is said: (b) "The marriage law of Ireland is what that of this country was prior to the Marriage Act; and as marriages in England were provable by circumstantial evidence prior to the Marriage Act, marriages in Ireland are, I apprehend, provable by the same species of evidence at this day." The judgment there distinctly proceeded on the ground that the presence of a priest was wholly unnecessary. *Smith v. Maxwell* (c) was a case which occurred before Lord WYNFORD when Chief Justice of the Common Pleas, and there it was held that a marriage in Ireland, performed by a clergyman of the Church of England in a private place, * was valid, although no evidence was given that any * 559 license was granted to the parties. The Lord Chief Justice there said, "I know of no law which says that celebration in a church is essential to the validity of a marriage in Ireland." This has been the doctrine held by the highest authority in the Courts in Ireland. In *Houghton v. Houghton* (d) there was a devise to S. and J. Houghton, on condition that if they formed a marriage contrary to the established rules of the Quakers, such devise should cease and be void. They did so, and a bill was filed praying that the will might be established, and the trusts thereof executed, and that the estates might be declared forfeited, the parties having married contrary to the condition in the will.

(a) 1 Ad. & El. 58.

(b) 1 Ad. & El. 64.

(c) 1 Ry. & Moo. 80.

(d) 1 Molloy, 611.

mentioned. In the argument it was said that Quakers' marriages were not recognized by law, but Lord MANNERS answered, "As to the question of the legality of a Quaker's marriage, I have no manner of doubt. I am quite satisfied that they were meant to be included in the 21 & 22 Geo. 3, c. 25, though the words of that Act may not apply to them;" and his Lordship decreed in accordance with the prayer of the bill. *The King v. Bathwick* (a) appears to have been much relied on in the argument in the Court below, but it is certainly difficult to see how it can be made applicable to the present case. *Wright v. Elgood* (b) is a case in which, in the judgment, *Dalrymple v. Dalrymple* was cited with marked approbation by Sir HERBERT JENNER, who said: (c) "Before the statute, marriages without publication of banns or any religious ceremony, contracted *per verba de præsenti*, * 560 might be good and valid, though irregular. The * parties and minister might be liable to punishment, but the *vinculum matrimonii* was not affected." In *The Queen v. Orgill*, (d) there was an indictment for bigamy. Two persons had been married in Ireland by a Roman Catholic priest; the woman was a Roman Catholic, the man represented himself to be so, but the case seems to show that that was not a true representation; when indicted afterwards for contracting another marriage, he was not allowed to set up his supposed Protestantism as an answer to the charge. The first marriage then could only have been valid as a contract *per verba de præsenti*. In that case reference was made to *Swift v. Swift*; (e) and *The Queen v. Orgill* will, no doubt, be attempted to be explained on the ground, that if parties go on such an occasion before a minister of a particular persuasion, they must be taken afterwards to have been followers of his creed. But such an argument cannot fairly be deduced from the case, which shows in substance that marriage by words of present contract has always been deemed valid in Ireland, and many convictions for bigamy have proceeded on that ground. These observations conclude the argument on the cases.

(a) 2 B. & Ad. 639.

(b) 1 Curteis, 662.

(c) 1 Curteis, 670.

(d) 9 C. & P. 80.

(e) 3 Knapp, 303.

Something still remains to be said upon the statutes. With regard to these, it must be admitted that some appear to bear one way, some another. It is clear that if the rule of Lord COKE (a) with regard to the construction of a declaratory Act, "whereby it appears what the law was before the making of the Act," is to be deemed the correct rule, then marriages of this description are proved to have been good before the statute. The 32 Hen. 8, c. 38, was an Act passed to *give validity to marriages regu- * 561 larly performed, notwithstanding any precontract; but taken in the most extensive application, that statute leaves open the question as to cases where such precontract had been consummated.

[LORD CAMPBELL. — It may be doubted whether a contract *per verba de præsenti* can be considered within that statute.]

It is clear that it is not, and that the statute only refers to contracts *per verba de futuro*. Then comes the 2 & 3, Edw. 6, c. 23, repealing the Statute of Henry 8, and leaving the law as it was before. The 12 Car. 2, c. 33, was merely an Act to confirm those marriages which had been celebrated under the ordinances of the Commonwealth. That was a confirmatory Act; but to be so, there must have been something for it to confirm: besides, it was passed to assert the authority of the Crown, and to make it appear that every thing which had been done in the mean time might be questioned but for that confirmation by the Crown. The 58 Geo. 3, c. 84, relates to Indian marriages, the legality of which it was passed to confirm, and it declared in the words of COKE, "what the law was before the making of the Act," so as to show that the doubts which it was intended to remove ought never to have been entertained. It is clear that even under the provisions, the somewhat unnecessary provisions, for the regulation of future marriages, to be found in that statute, the present must be considered as a valid marriage, for the minister who performed the ceremony here was, as the spe-

(a) Co. Litt. 290; 1 Bl. Com. 86.

cial verdict finds, the regularly placed minister of the town where the parties resided.

Supposing it, therefore, to be necessary that a ceremony should be performed by a clergyman, the presence of a
 * 562 Presbyterian clergyman is sufficient. The * marriage would certainly be good with his presence, but it would have been good without his presence. If the latter point should be conceded, there is an end of the question altogether. But supposing that point to be disputable, then it is contended that if the presence of a priest was necessary, the presence of a regular Presbyterian minister would, in Ireland, completely fulfil that condition. The regularly ordained ministers of the Presbyterian church in Ireland are as much recognized by law as the clergymen of the Church of Scotland. They have the *regium donum*, the same privileges, and the same character. The statute last mentioned recognized as a rule that the person officiating at a marriage need not be in the holy orders of the Church of England. The same rule was recognized in a more recent statute. In the 4 Geo. 4, an Act was passed (c. 67) to declare valid certain marriages which had taken place at St. Petersburg since the British factory there had been abolished. That factory was abolished in 1807. The Act in question was passed in 1823. The doubts which this statute was passed to remove arose, in all probability, from these circumstances: There had been a factory at St. Petersburg, with peculiar privileges, being recognized by the Emperor of Russia as a place within which British laws, customs, and privileges were permitted to a certain extent to be treated as law. These factories existed in many cases under treaties; that was not the case with the factory at St. Petersburg, and in 1807 the emperor abolished that factory. Marriages between British subjects afterwards took place in the chapel of the British Commercial Company
 at St. Petersburg. As doubts had arisen whether
 * 563 such marriages were * good, as the factory had been abolished, the Act declared that they should be as good as if the factory still continued in existence. The 4 Geo. 4, c. 91, was another Act passed "to relieve his Majesty's subjects from all doubts concerning the validity of cer-

tain marriages solemnized abroad." Officers of the army and navy, and even captains of merchant ships, had celebrated marriages. This statute was passed with reference to this very practice. The preamble declares that "Whereas it is expedient," not to confirm the marriages, but "to relieve the minds of the subjects from any doubts as to marriages solemnized by a minister of the Church of England in the house of a British minister, or in the chapel of any British factory, or in the private house of any British subject residing in such factory, or solemnized by any British chaplain within the lines of any British army serving abroad." So far, therefore, the Act seems only to apply to marriages celebrated by a person in holy orders; but the second section enacts that nothing therein contained shall "confirm or impair or in any wise affect the validity in law of any marriages solemnized beyond the seas," except those specially named therein. This is a recognition that marriages beyond seas, without the presence of a person in holy orders, were valid. The objection raised with regard to this and other Acts of the same kind has been, that if it was the intention of the legislature to lay down a general rule, it ought to have declared, in a plain and direct manner, that all marriages *per verba de præsenti*, celebrated out of the jurisdiction of the English Marriage Act, should be good. The answer to this objection is, that such has not been the practice of the legislature. The particular Act to * which reference is now made has no prospec- * 564 tive purpose of legislation at all. That Act enacts nothing new; it declares that marriages that had so taken place were good. This statute puts the presence of a priest and of any officer on the same footing.

THE LORD CHANCELLOR. — Why was a legalized officer necessary, under that Act, to render valid a marriage within the lines of a British army, — an officer "officially under the authority of the commander"?

The Attorney-General. — That was done for the purpose of not interfering with the *lex loci*.

LORD CAMPBELL. — Do you go so far as to say that the marriage of two British subjects in a foreign country, not at the chapel of the ambassador, or within a factory, or within the lines of an army, by an officiating chaplain or officer, would in all cases be valid ?

The Attorney-General. — Certainly not, for then the parties would be interfering with the *lex loci*, which is always to be avoided ; but the marriage would be valid if there was no such interference. There are two other Acts deserving of attention. The first is 57 Geo. 3, c. 51, which relates to marriages in Newfoundland. That Act requires that all marriages there shall, after the 1st of January, 1818, be celebrated by persons in holy orders. But then comes a proviso, which is not an enactment, to the effect that the Act shall not affect marriages where there were unforeseen difficulties in obtaining the presence of a person in holy orders. This is a perfectly new provision ; it has no precedent in the treaties of text-writers, or in the decisions of any Courts, but it has, nevertheless, been established as clear law with respect to Newfoundland. The second section of that statute

* 565 * declares that nothing therein contained should be construed to extend to marriages celebrated in Newfoundland before the 1st of January, 1818, nor to Jewish nor Quaker marriages. On this section the observation arises, that it recognizes the validity of all marriages thus excepted from the Act, and of course marriages *per verba de præsenti* among the rest ; for as there is no doubt of the validity of Quaker and Jewish marriages, and as these and the others are put on the same footing and treated in exactly the same way, the legislature must be considered to have recognized the validity of all alike. This Act was followed by that of the 5 Geo. 4, c. 68, which made other provisions for the celebration of marriages, but which, though subjecting the parties who violate these regulations to certain penalties for such offence, declares in every case the marriage to be valid. This marks the principle on which the legislature proceeded.

This brings the argument to the point where it becomes necessary to consider the provisions of the Irish statutes. They may be obscure, if the ordinary rules of construction applicable to bonds and such instruments are applied to them, and if the great principles of the law are not to be applied to them; but otherwise they will be clear enough. The Acts which were passed to discountenance or suppress the Roman Catholic religion may, with regard to such matters, be passed over almost altogether; but these statutes must be referred to for the purpose of elucidating other things. The 12 Geo. 1, c. 3, is the first statute to be referred to. That was passed to prevent marriages by degraded Roman Catholic priests, and by laymen pretending to be clergymen of the church of Ireland; and to prevent marriages consummated *from being avoided by pre- * 566 contracts. In that respect it resembles the spirit of the 4 Geo. 4, c. 91, which relates to marriages abroad. The celebration of marriage by the popish priest is made felony without benefit of clergy. It is curious that in this statute persons are forbidden to celebrate marriages who would have been entitled to celebrate them; and persons who never could have been entitled to celebrate them are put on the same footing with the others.

[THE LORD CHANCELLOR. — Are the marriages themselves, when so celebrated, declared void?]

They are not expressly so declared; but it is not to be denied that the legislature did, in more cases than one, intimate such to be its intention.

[LORD CAMPBELL. — Is it not clear that a marriage between a Roman Catholic and a Protestant in Ireland, or between two Protestants there, if celebrated by a Roman Catholic priest, is void?]

It is void; but the general spirit of the legislature in Ireland, as in England, has been to check the celebration of certain marriages rather by penalties on persons who improp-

erly celebrated marriages, than by declaring such marriages to be void. There can be no doubt that, from the earliest times, a religious ceremony has been adopted in marriage; but that circumstance alone no more shows a religious ceremony to be necessary to the validity of the contract than the fact, that from the earliest times it has been the custom from a religious feeling to have prayers before entering on any important business, renders that business invalid if the prayers are not uttered. There can be little doubt that people have erroneously confounded the desire to have a religious sanction with the necessity for having it.

[THE LORD CHANCELLOR. — The statute says that marriages of this sort have been celebrated “to the manifest
* 567 ruin of * many families;” which implies that the marriages were valid, but by reason of being clandestinely had with improper persons brought ruin on the families.]

That is certainly the proper interpretation of the statute. Again, the Act speaks of a layman pretending to be a clergyman of the church of Ireland. What if the person celebrating such a marriage had actually been a clergyman of the Church of England? No distinction is made between them; but there is a distinction made between a popish priest of Ireland and of England. This is remarkable, and shows that the statute has been loosely framed and must not be strictly construed. The second section is also remarkable. It makes provision for the discovery of the marriages and the punishment of the offenders; but nothing whatever is said of dissolving the marriage or declaring it to be illegal. The parties are to be sought out and examined, not with a view to put an end to the marriage, but to discover and punish the parties who have celebrated it. Then there is a provision respecting consummation, to the effect that no contract of marriage only, not consummated by carnal knowledge of the parties, shall be avoided by a contract that has been so consummated. The precontract thus alluded to must be a contract *per verba de præsenti*.

This statute was followed by 19 Geo. 2, c. 13, by which the marriages between Papists and Protestants, and between two Protestants, celebrated by a popish priest, are declared null and void without any sentence or process of law whatever. This statute gives a degree of force to a previous argument that makes it irresistible. The 12 Geo. 1 did not make the marriages void; the 19 Geo. 2 makes all such marriages void for the future, — and some of them that had been already celebrated. What, then, becomes of a marriage *celebrated by a layman pretending to be a *568 member of the Irish church; for there is no reference whatever in this last statute to marriages so celebrated? It is good under these two statutes, though the person celebrating it may be punished under the earlier of them. The English Marriage Act itself directed that thenceforth all marriages should be in a church and by banns; but even that statute did not direct that the marriage should be celebrated by a person in holy orders.

[THE LORD CHANCELLOR. — But some years ago a person of the name of Smith, not being a person in holy orders, celebrated in a church and by banns many marriages, and it was deemed necessary to pass an Act to validate them; which would show that the presence of a true priest was considered necessary under that statute.]

That might have been only to satisfy doubts. The 23 Geo. 2, c. 10, which recited the two previous statutes (Irish), contains this remarkable provision, § 3, that the priest should suffer notwithstanding the marriage should be declared void under the 19 Geo. 2, — a provision which, in the clearest manner, shows the intention of the legislature, and the view it entertained of the existing law. The whole scope of the argument on the three statutes, the 12 Geo. 1, the 19 Geo. 2, and the 23 Geo. 2, is, that marriages celebrated by one class of the persons described in those statutes, namely, the laymen, though forbidden to be so celebrated, would be valid but for the provisions of one of these statutes, yet the consequence

would be that the persons celebrating them render themselves amenable to punishment.

Then comes 21 & 22 Geo. 3, c. 25 ; but before mentioning it, perhaps it will be as well to mention an observation of Lord COKE, in *Twyne's Case*, (a) as to the construction of a declaratory Act: "Note well this * word (*declare*), by which the Parliament expounded what the common law was before." The Act 21 & 22 Geo. 3, c. 25, was passed for the purpose of recognizing marriages which had taken place before its enactment ; it is intitled "An Act for the relief of Protestant Dissenters in certain matters therein contained." The recital was, "Whereas, the removing any doubts that may have arisen" — it does not pretend to say that the doubts are well-founded — "concerning the validity of matrimonial contracts or marriages entered into between Protestant dissenters, and solemnized by Protestant dissenting ministers or teachers, will tend to the peace and tranquillity of many Protestant dissenters and their families ;" not that it would change the *status* of the parties, but that it would tend to the peace of their families. If the marriages had not been valid, the statute never would have been introduced by such a preamble. It then goes on to declare that all marriages between Protestant dissenters should be held valid, in like manner as if such marriages had been duly solemnized by a clergyman of the church of Ireland, but that nothing in it contained should be construed to extend to make void the provisions as to offences against the statutes against clandestine marriages. On this Act Mr. Justice PERRIN founds his judgment, and observes that "This is a declaratory Act: the marriages were good before." Why were they good ? It must be either because all contracts of marriage were valid, if they were before witnesses and capable of being proved, or that, if any religious ceremony was necessary, it was not necessary that it should take place before a person in full orders in the Church of England. There is no escape from this conclusion. This statute was the foun-

(a) 3 Rep. 82 (b).

dation of Lord MANNERS's * judgment in *Houghton v.* * 570 *Houghton*, when he held that a Quaker's marriage was valid. The 12 Geo. 1 recognized a marriage by a layman to be a good marriage; and the 21 & 22 Geo. 2 declares what the common law is, and makes a marriage good on one or other of the suppositions just stated. These are the arguments which suggest themselves on the Irish statutes.

The case of the Quakers may be now considered. There is no instance of an administration in the Ecclesiastical Courts being refused to a Quaker.

[THE LORD CHANCELLOR. — You must go further, and show that there have been applications for them. Unless the question has been raised, there is nothing in the argument. Their affairs are settled in their own societies.]

Cases of claims of administration by Quakers must have arisen, and there is no instance of a refusal to allow an administration to a Quaker on the ground of the invalidity of his marriage. On the contrary, they have never been considered included in the Marriage Act; and though lately their marriages have been expressly recognized, no one ever before doubted respecting them. In the printed report (a) this matter was thus remarked on: "The case of *Dee v. Thomas* (b) proves beyond question that a ceremony according to the form of the Quakers constituted a valid marriage, and that the interposition of a clergyman is not necessary, if the ceremony is celebrated before witnesses according to the rites and customs of that respectable society." If there is no case of a suit for the grant of administration to a Quaker, there is the case of a suit for a divorce, in which a Quaker applied to the Ecclesiastical * Court * 571 for a divorce, and the marriage was treated as a good marriage and the suit was entertained: yet in such a case an actual marriage is required to be most strictly proved. No observations need be made on the case of the Jews; for however anomalous their right to celebrate a marriage in

(a) Dix's Report, p. 240.

(b) Moo. & Mal. 361.

their own forms, it must be admitted that they have been considered and treated as a peculiar people ; so that no arguments of any great weight can be derived from the case of the Jews. But the case of the Quakers is decisive. They are English subjects ; they are dissenters from the church ; they sprang up within legal memory, and at the time of the earlier decisions upon them, their origin was within living memory. They were Christians, — English subjects, — not claiming any connection whatever with any foreign power : they severed themselves from the Church of England, and yet their marriages have always been considered valid. It is therefore clear that a religious ceremony in marriage has not always been held to be in law a necessary part of the Christian religion. No ceremony of that sort was bequeathed to the world by the great Founder of our religion ; though from the earliest times all persons had no doubt a desire to sanctify, by religious rites, a contract of so much and such lasting importance.

[LORD ABINGER. — What was the case in which the validity of a Quaker's marriage was first admitted ?]

In a case referred to in a note to the case of *Lindo v. Belisario*. (a) The name of the case is not given, but it is quoted from Sewell's Hist. Quakers, p. 492. There the marriage was held valid for the purposes of an action of ejectment. This was decided in 1660, at the Nottingham assizes.

* 572 . [LORD * ABINGER. — But that marriage might have taken place under the ordinances of the Commonwealth.]

It might be so ; the case does not show that one way or the other ; but the authorities, most of which are collected in the note referred to, clearly show that the validity of such a marriage has long been established, and constant practice and legislative recognitions now leave no doubt upon the matter.

(a) 1 Hagg. Cons. Rep. App. 9, n.

In *Woolston v. Scott* (a) it is spoken of as a matter of clear law. From the earliest time the marriages of Quakers have been considered good for all purposes, — for ejectment, succession, administration, actions for criminal conversation, and every other legal purpose. That is utterly irreconcilable with any other notion than that, by the common law of England, a priest in holy orders was not essential to matrimony; and it shows that when the legislature insisted on other sects of Christians adopting a form of marriage which an ordained priest was required to celebrate, the Quakers were still allowed to enjoy the benefit of the old common law.

This brings the case to the third branch of the argument; namely, that a Presbyterian minister fully satisfies the supposed necessity for the presence of a priest. Upon this point *Sanchez* (b) may be referred to, and he shows the priest there more in the character of a witness than an officer, and requires him to receive the declared consent of the respective parties, and not to put the form of consent into their mouths and ask them if they adopt it. In *M'Adam v. Walker*, (c) Lord ELDON adopts the expression of Lord STOWELL in *Dalrymple v. Dalrymple*, and says: “ * The fact was, * 573 that the canon law was the basis of the marriage law all over Europe, and the only question was how far it had been receded from by the laws of any particular country. By the canon law, the distinction between the contract *de præsenti* and the promise *de futuro* was well known; the former constituting a good marriage of itself; the other not, unless followed by *copula*, or some other act which is held in law to amount to the carrying the promise into effect.” It may be said, perhaps, that this was an *obiter dictum* of Lord ELDON; but if so, the only observation necessary, in answer to that objection, is, that as he was the most cautious as well as learned Judge that ever sat on the bench, his very *obiter dicta*, if so they can be called, are entitled to the weight of the highest authority. It is difficult to find the

(a) Bull. N. P. 28.

(b) Book III. Disp. 88, par. 4 & 5, pp. 297, 298.

(c) 1 Dow, 181.

law which requires in terms the presence of a person in holy orders. It is *lex non scripta*. There is no case whatever to that effect, before our own Marriage Act. What is the meaning of the phrase, "Per Presbyterum sacris ordinibus constitutum?" Could not a deacon marry before our Marriage Act?

[LORD CAMPBELL. — Could he?]

No doubt has ever been entertained upon the subject.

- [THE LORD CHANCELLOR. — The expression means a full priest, a priest capable of performing a mass.

LORD CAMPBELL. — Where do you find that a deacon can marry?]

It is one of the first acts he performs. A residence in a university makes every one aware of the fact. The discussion of this point will carry the House to the root of the question, and will show that it arose not in the law, but in the religious feeling of the community. The marriage ceremony, as directed by the Act of Uniformity, allows a deacon to perform the ceremony. He can do any thing but
 * 574 give absolution and bless the * elements of the sacraments; though he may assist in the distribution of them. Very many of the curates of England are only deacons. In the church of Rome a deacon could not marry: a priest was required there. But that was because the mass accompanied the act of marriage; and a mass-priest was therefore required. But that reason does not exist in the English church, and therefore a deacon can marry in the English church. If any priest is necessary, a Presbyterian minister is sufficient to fulfil the demands of the law. The special verdict finds that the Rev. John Johnstone was a placed and ordained minister. The meaning of that phrase must be the same in Ireland as in this country.

[THE LORD CHANCELLOR. — In Watson's Clergyman's
 [488]

Law (a) it is said that a deacon can marry: "So also, by parity of reason, he hath used to solemnize matrimony and to bury the dead."]

That is so. The Presbyterian minister is sufficient, if a priest is required. The Act of Union with Scotland recognizes and establishes the Presbyterian church as a church. And in article 25 an Act of the Scottish Parliament is recited, and is made part of the law of Great Britain: so that the Scotch church is now made part of the true Protestant religion of Great Britain. The Presbyterian minister is therefore fully recognized by law. There are two presbyters in the Scotch church; one elected by a district, the other ordained by the laying on of hands. The latter is "Presbyter sacris ordinibus constitutis;" and, indeed, they are called ordained ministers in the 25 of Geo. 3, which declared valid the marriage by Presbyterians in the East Indies. If the Presbyterian minister is recognized by law in Scotland, he is equally * so as a member of the Scotch * 575 church, when resident in Ireland. The 41 Geo. 3, c. 63, supports this view of the case. That statute was passed to exclude persons in holy orders from sitting in Parliament. It excludes Scotch clergymen. That is a legal recognition that a Scotch Presbyterian minister is a person in holy orders. The history of the Scotch Presbyterians in the north of Ireland shows their regular descent from and connection with the Scotch church.

The result of the whole argument is this: The case before the House will decide not only this individual matter, but the legal rights of many other persons.

Marriage in this country, as well as elsewhere, has been, in accordance with the civil law, treated as a matter of civil contract alone. To this the piety of the world has added a religious observance; but this was not necessary, till a statute of this country required that it should be so.

[THE LORD CHANCELLOR. — Suppose a promise of marriage

in Ireland, and a seduction thereon, and then the man marries; could not an action of breach of promise of marriage be maintained? If it could, how would the promise *de futuro cum subsequente copula* be sufficient to constitute a marriage?]

It cannot be said that such an objection would or would not be fatal to the right of the action; for there is no instance of such an objection having been thought of. But it is possible to conceive that the evidence in such a case might disclose a state of facts which would show that the *copula* was not a completion of the promise, but was obtained as the condition on which that promise was to be performed; in which case the *copula* would not fulfil the character which the law requires it to possess when rendering perfect a * 576 contract *de futuro*. For these * reasons it is submitted that the judgment of the Court below must be reversed.

The Solicitor-General, on the same side. — It is not necessary to travel again over the mass of authorities put before the House. The authorities are not only to be found in the arguments in the Courts below, but in a very learned note of Mr. Jacob's Roper on the Law of Husband and Wife. (a) It is, in fact, that note which has given rise to this discussion. It is contended, on the part of the prisoner, that the present contract of marriage, entered into before witnesses, and followed by cohabitation, was altogether null and void. Why is it so? Because, as it is said, the absence of a priest in holy orders made it so. It is not clear whether he is required merely to be present at the ceremony, or to take a part in it; to observe it merely, or to pronounce the nuptial benediction. It never was essential to the validity of a marriage, by the common law of England, that a priest should be present. This marriage must be considered in exactly the same light as the marriages of English subjects before our Marriage Act. The importance of declaring what is the common law of England as to marriage may be estimated, when it is remembered

(a) Page 445.

that that law is in force in all her Majesty's dominions, except in England itself. In all those dominions the contract is good; and the Act passed but a few years ago for this country recognizes the principle of the old common law, that a marriage *per verba de præsenti* is good without a religious ceremony, but that the legislature assumes that, for the decent and solemn performance of this most solemn * act, a religious ceremony will be superadded. What * 577 were the exceptions from the Act of 26 Geo. 2? Take the case of the Quakers. If their marriages between the time of that statute and the recent Act of Parliament were not valid, they never could have succeeded to inheritances in land; their property would not have been administered by them, but would have vested in the Crown; and all the consequences of illegitimacy would have attached on their offspring. Yet none of these things has ever happened; and why? Because, after the Marriage Act, their marriages were allowed to be good on the same principle as before; namely, the principle of a present contract under the common law. How was our own law derived? It was derived from the canon law, which was received into this country, and had been adopted here, except for one great purpose, that of legitimating children by the effect of a subsequent marriage. In *Lindo v. Belisario*, (a) Lord STOWELL says of the canon law: "The principles which regulate English marriages are such as are also generally applicable to the marriages of foreign countries, — the marriage law of England being founded on the same general principles, and having for its basis the ancient canon law. So that there is not much danger that the Court can proceed wrongly on such general principles and on such a basis." There is another very high authority in *M'Adam v. Walker*, (b) where Lord ELDON says, "The fact was, that the canon law was the basis of the marriage law all over Europe, and the only question was, how far it had been receded from by the laws of any particular country. By the canon law, the distinction between the contract *de præsenti* and the promise *de futuro* was well * 578

(a) 1 Hagg. C. Rep. 216.

(b) 1 Dow, 148, 181.

known; the former constituting a good marriage of itself; the other not, unless followed by *copula*, or some other act which is held in law to amount to the carrying the promise into effect . . . With respect to the decisions, it was a position again and again clearly recognized in them, that the contract *de præsenti* formed marriage, *ipsum matrimonium*, and the judgments of the House of Lords had not trenched on the general doctrine." Here is the principle stated by the very highest authority. The basis of the canon law was, that it was not necessary to have any religious ceremony; a contract *per verba de præsenti* was *ipsum matrimonium*. Then, has the common law of England superadded to that the necessity of the presence of a priest, and the observance of some religious ceremony? That was not likely to be done by the common law, when the ecclesiastical law itself did not require any thing of the sort. It is admitted on the other side, that by the common law, if the parties entered into a contract of marriage *per verba de præsenti*, it was a binding contract for themselves; and if, after such a contract, the parties had gone to live with other persons, they could be punishable for adultery. On the other hand, if the parties lived together, though they might be censured for omitting the ceremonies of the church, they could not be punished as for fornication. And still further, if, after such a contract, the two parties afterwards married other persons, even by the most regular forms, in *facie ecclesiæ*, the children of these latter marriages would be bastards, and the marriages void. All this is conceded on the other side; and yet it is said that this contract is not a marriage; that the husband would not be entitled to lands in right of his wife; the wife

* 579 would not be entitled to dower; * and the children would not be legitimate. So that they admit many of the incidents of marriage, but deny some of them. But Lord STOWELL, in the judgment in *Lindo v. Belisario*, (a) says, "The addition that the parties are living in sin, venially but not criminally, has been pushed too far in argument, when it is contended that the parties would not have the lawful use

(a) 1 Hagg. Cons. R. 229.

of each other's persons in the way of marriage ; for I conceive it only means that they were offending against the orders of the church: that it was an irregularity, similar to what is known to have existed in the books of the canon law, where it is held that marriages, though clandestine and irregular, are nevertheless valid." It can be shown, that though the ecclesiastics required the marriage to be performed in the face of the church, still a marriage not so celebrated was a perfectly valid marriage.

[LORD CAMPBELL. — That is clearly the case in Scotland.]

And this argument arises thereon: if the marriage is not valid, what right have the Ecclesiastical Courts to command, at a subsequent period, the observance of the ceremonies of the church? These Courts would have no right, never pretended to have any right, to enforce the completion of a contract; all that they could do was to enforce the observance of certain rules in the making of the contract. But to go on with Lord STOWELL's judgment: he says, speaking of the irregularity of the marriage, "The sin they commit is against public order, but will have no effect on the validity of the marriage." He adds, "It is held by some persons that marriage is a contract merely civil; by others, that it is a sacred, religious, and spiritual contract, and only so to be considered." * He himself thinks that "neither of these * 580 opinions is perfectly accurate." He then goes on to describe what would, as a matter of principle, constitute a marriage, and says, "The contract thus formed in the state of nature is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil." These he remarks upon at some length, and then expresses his opinion that, though certain public ceremonies may be necessary to constitute a regular marriage, the marriage may nevertheless be good, and the *vinculum* may well subsist without them. Following out his reasoning on this subject, he quotes and adopts Swinburne, who, in his book on Espousals, says, (a) "A present and

(a) Sect. 4, par. 8.

perfect consent alone maketh matrimony, without either public solemnization or carnal copulation ; for neither is the one nor the other of the essence of matrimony, but consent only." In his opinion, therefore, no religious ceremony was required by the church as essential before the 26 Geo. 2 ; and if not required by the church, it can hardly be supposed to have been required by the law, which originally was derived from the church. It is impossible to conceive the law insisting on religious ceremonies which the church itself did not consider essential.

Then comes the argument, that the Ecclesiastical Courts will not presume in favour of a marriage not had in the face of the church ; but that presumption is not asked or needed, if, in the words of Bracton, the contract can be proved. The English canonists are clear on this subject. In the *Pupilla Oculi*, by John de Burgh, published at the beginning of the fourteenth century, and mentioned in Lyndewoode, it * 581 is so said in * a part entitled "*De Sacramento Matrimonii*." (a) On this title some comment has been made. It has been said that, being a sacrament, it requires the intervention of a priest. That, however, is a mistake. There are sacraments which do, and some which do not, require the presence of a priest.

[LORD BROUGHAM.— If that is not so, there is an end of the case decided in the Privy Council the other day, (b) where baptism by a layman was held sufficient.]

Certainly. Marriage and baptism are both sacraments, and yet the presence of a priest was not absolutely required by the canon law at either of them. The passage from De Burgh's *Pupilla Oculi* (for which the counsel for the plaintiff in error are indebted to the researches of a learned friend) (c) is to this effect: (d) "*De ministro hujus sacramenti notandum est quod non requiritur alius minister distinctus ab*

(a) *Pupilla Oculi omnibus Presbyteris precipue Anglicanis summé necessaria*, Pt. 8, c. 1.

(b) MS.

(c) Mr. J. R. Hope, of the Chancery bar.

(d) Part 8, c. 1.

ipsis contrahentibus: ipsimet enim ut plurimum sibi ipsis ministrant hoc sacramentum, vel mutuò, vel uterque sibi. Et si omnis verus contractus matrimonialis sit sacramentum potest hoc sacramentum ab aliis conferri, nam quandoque patres contrahunt pro filiis, i.e. pro filio et filiâ præsentibus non experimentibus signa proprii consensus; ex quo videtur quod quilibet talis potest esse minister hujus sacramentii indifferentur qui potest esse minister idoneus in contractu matrimoniali secundum Sco. di xxvi. Patet etiam quod ad collationem hujus sacramenti non requiritur ministerium sacerdotis, et quod illa benedictio sacerdotalis quamquam solet presbyter facere sive proferre super conjuges, sive aliæ orationes ab ipso prolatae non sunt forma sacramenti, nec de ejus essentiâ, sed quoddam sacramentale ad ornatum pertinens * sacramenti.” * 582

In another part of the same work it is said: (a) “Dicit etiam Wil. quod mortaliter peccat qui ante benedictionem nuptialem uxorem cognoscit, saltem in locis ubi consuetum est eas benedicere.” From which it clearly appears, even according to this great ecclesiastical authority, that though it was a sin towards the church to proceed without the benediction of the church, that benediction was not necessary to the validity of the contract. The decree of the Council of Trent made provision for the presence of a priest. How that decree affected the law of the countries where the decree was in force, will be seen from a judgment of Lord STOWELL, in the case of *Herbert v. Herbert*. (b) But that decree requires not a priest, but the priest of the parish; and the object of it was, not to ensure the performance of an ecclesiastical rite, but to secure evidence of the marriage by some local authority, induced by duty and interest to preserve a memorial of it. But to proceed with this author, who shows that such was the object, while he is explaining the meaning of the words clandestine marriage: (c) “Inhibitum est contrahere nuptias occultè, sed publicè coram sacerdote sunt nuptiæ in Domino contrahendæ (xxx. q. v. nullus) prohibentur etiam clandestina matrimonia duplici ratione; ne videlicet sub specie matri-

(a) Part 8, c. 5.

(b) 2 Hagg. Cons. Rep. 263; 3 Phill. 58-64.

(c) Pupilla Oculi, Part 8, c. 4; “De Matrimonio Clandestino.”

monii fornicatio committatur, et ne matrimonialiter conjuncti injustè separentur. Sæpe enim in matrimonio occultè contracto alter conjugum mutat propositum, et dimittit reliquum probationis destitutum et sine remedio restitutionis (xxx. quæst. in summâ). Item matrimonium clan-

* 583 destinum sive occultem * omissis solemnitatibus con-

suetis non præsumitur conjugium, sed adulterium sive fornicatio (ut xxx. quæstio v. aliter); non tamen intellige quin matrimonium, ritè contractum, quamvis occultè, sit verum matrimonium. Sed canon loquitur secundum quod ecclesia de tali matrimonio præsumit. Unde nota (secundum Pe.) quod dupliciter potest consensus dici clandestinus.

Uno modo quando fit contractus in præsentia testium tamen sine solemnitate ecclesiastica et publica: et talis consensus facit verum matrimonium et etiam præsumptum."

Nothing can be clearer or more direct than this authority; and it is to be recollected that the writer was an ecclesiastic holding high office, one who would be called on to enforce the law he was thus laying down, and who yet shows in the plainest manner, that, though the church ceremony was required as a matter of regularity, and though the parties might be ecclesiastically punished for not observing it, yet the absence of it did not affect the validity of the contract. Surely, if the laws of the church did not render such a ceremony necessary to the validity of the contract, the laws not of the church could hardly be more strict in a matter entirely relating to the church. De Burgh thus goes on: "Alio modo quando fit sine solemnitate, et etiam absque præsentia testium; et talis facit matrimonium verum sed non præsumptum. Unde consulendum est talibus quod de novo et publicè contrahant, et agant penitentiam quin scandalizaverunt ecclesiam." It is hardly possible to conceive a doctrine of law more fully asserted and explained than is the law of marriage in these extracts from the works of De Burgh. From him, who was a Roman Catholic priest, who was vice-chancellor of

Cambridge, and held high preferment, giving instructions to the clergy * of England, we learn most distinctly that the presence of a priest was not necessary.

No authority can be well conceived to be more direct. In

Dalrymple v. Dalrymple, Lord STOWELL gives the explanation of what he calls clandestine marriages. He says, (a) "Different rules, relative to their respective effects in point of legal consequence, were applied to these three cases, of regular marriages, of irregular marriages, and of mere promises or engagements. In the regular marriage, every thing was presumed to be complete and consummated, both in substance and in ceremony. In the irregular marriage, every thing was presumed to be complete and consummated in substance but not in ceremony, and the ceremony (Swinb. § 17, par. 1) was enjoined to be undergone as matter of order. In the promise or *sponsalia de futuro*, nothing was presumed to be complete or consummate, either in substance or in ceremony."

This opinion of Lord STOWELL is so exactly in conformity with the expressions of De Burgh, that though that writer is not expressly mentioned, it must be supposed that Lord STOWELL was familiar with his work. There is another authority (likewise furnished to the counsel here from the same learned source) to be found in the work of Walter, a German writer on the canon law, of which he was appointed professor at the university at Bonn. He says, in the paragraph of "Marriage as a Sacrament:" (b) "Marriage is a relationship proper to the order of nature, which, by the law of the new covenant, has been brought back to its primitive purity, and raised to the rank of a sacrament. The subject-matter of this sacrament, then, is the married state as such: the form depends upon the *manner in which two *585 persons enter into the Christian marriage state, which, according to the discipline of the particular time, may change, and in reality has changed. Lastly, it is the spouses themselves who, by the fact that they enter into the state in a lawful manner, perfect the sacrament. This conception of the matter arises from the internal essence of this relationship, and is the dominating one. Some persons maintain that the spouses, between themselves, do no more than complete a civil contract of marriage, and that this contract is not raised to the rank of a sacrament until after the sacerdotal benedic-

(a) 2 Hagg. 65.

(b) Man. Eccl. Law of all Christ. Conf., 8 edit. p. 579, par. 295, § 4.

tion. But this opinion, despite some apparent reasons that may be adduced in favour of it, has too much against it to be maintained. If, then, we proceed from the first position, as that which alone is the right one, the distinction between contract and sacrament will disappear, and a connection will exist in the sense of the church ; the contract being either no marriage at all, and therefore something not allowed, or else it will be at the same time a contract and a sacrament. Even the marriages of Protestants, considered in this point of view, are in themselves to be treated as sacraments. From this it follows that the distinction between an active and passive assistance of the priest is not admissible in the cases of marriage ; because every and any assistance, even that in which the priest merely looks on and listens to, makes the connection a sacrament, and is therefore, in truth, an active assistance. But though, according to this view, the sacerdotal benediction is not essential to the sacrament, yet the endeavour to obtain it ought not unnecessarily to be neglected. If

it be omitted in disobedience to the church, then, though
 * 586 the marriage in itself is still a sacrament, it * is, so far as the spouses are concerned, a sacrament that has been abused, one without sacramental grace, and a sin.” Here it may plainly be seen why the absence of the ceremonies of the church was an offence punishable by the church, while at the same time the contract that ought to have been solemnized according to its rules was indisputably valid. This writer shows, in the clearest manner, that at no time was the religious ceremony an essential part of the contract. So far from it, that even the opposition of the minister cannot affect the validity of the marriage, provided only he has heard the declaration. And even from the decree of the Council of Trent, it is plain that clandestine marriages might be good. The object of that decree was simply to enforce what had before been the object of the church, to obtain the presence of some person who could attest the marriage. And Walter shows this, for he goes on to say, (a) “ According to the circumstances that have thus been described, it was often diffi-

(a) Walter, Par. 293.

cult to distinguish an informal marriage from concubinage, and, in fact, the church had no means in its own hands of carrying on a direct and wholesome superintendence over the law of marriage. Upon this account, the Council of Trent felt itself induced to promulgate an ordinance on the contracting of clandestine marriages, which ordinance contained a very important innovation. First, it adhered to the principle that the marriage must be preceded by a triple proclamation in the church ; but that, even now, is not absolutely necessary to the validity of the marriage, but its importance consists in this, that it may afford the means for third persons to enforce their reasonable objections to the marriage.

* If they neglect to do this, their right to make the * 587 objection has gone. Secondly, the direction is now that both parties must make known their intentions before their lawful priest and at least two witnesses. This form has been declared so essential, that without it a marriage shall be entirely invalid. The object, nevertheless, is simply this, to obtain the presence of a witness who can be relied on, in order that a marriage may with certainty be ascertained to be such. Therefore, the persons who have been named need not have been expressly invited to be present at the particular act, and even the objection of the priest himself does not hinder the validity of the marriage, if he really has heard the declaration of the parties. If the two parties live under different priests, the presence of one of them is sufficient. Further, the marriage is valid, even though the declaration should be made before the priest within the year in which he has not obtained the higher orders. Thirdly, the marriage so contracted shall be confirmed by sacerdotal benediction, according to the ancient usage ; and that shall be imparted by the lawful priest, or by him whom he has commissioned for the purpose, and registered in the church. Other ceremonies are also to be observed ; but all this is not essential to the validity of the marriage."

[LORD CAMPBELL. — If the priest's opposition will not prevent the marriage, it must be presumed that when he declares his opposition, he does not administer the mass.]

That may be so, and then the contracting parties may be liable to ecclesiastical censure, but still the contract will be binding. To return to the Council of Trent: the effect of the decree of that Council was brought under the * 588 notice of the Ecclesiastical * Courts of this country, in *Herbert v. Herbert*. (a) Lord Herbert had married a Sicilian lady in Sicily. The marriage did not take place in the face of the church, but in the house of the lady, in the presence of two persons and the parish priest. Evidence was given to show that, though clandestine, the marriage was good by the laws of Sicily. The Council of Trent anathematizes those who say that clandestine marriages are void; and the marriage was held to be good. In the Grand Coutumier, (b) it is stated that if a man promise a woman that he will marry her, and they have carnal knowledge of each other, the children are reputed legitimate, although it was not a marriage in face of the church; for that the promise and the consummation constituted the marriage, and the solemnities of the church only served to confirm and notify what the parties had done. These old authorities are in strict conformity with the principle of the recent Act of Parliament, and that Act itself is in strict accordance with the old common law. The strongest authorities against the validity of clandestine marriages are those occurring in cases where a priest was present. A bishop was present and solemnized the marriage in *Foxcroft's Case*, (c) which case, however, is not law, and therefore cannot affect the present. The case of Del Heith (d) is the same, and is liable to the same observation. It is not contended on the other side that these cases are law, but still the presence of the priest is insisted on. There is no authority for that. Nobody * 589 doubts that a marriage * *per verba de præsenti* will be decreed by the Ecclesiastical Courts to be performed in the face of the church. That could only be on the ground

(a) 3 Phillimore, 58, 64; 2 Hagg. 263, 271.

(b) Ch. 27, fol. 46, La Rochette sur la Grand Coutumier.

(c) 10 Edw. 1; 1 Roll. Abr. 359.

(d) Rog. Ecc. Law, 584, cited from Harl. MSS. 2117, fol. 339; 34 Edw. 1.

that the marriage was a marriage, and that the parties having so contracted marriage must pay the respect due to the orders of the church, by celebrating it in the face of the church. What are the authorities for this proceeding? Burn's Ecclesiastical Law (a) gives them, and plainly states the reason and purpose of the after-celebration of the church: "Heretofore, if any having contracted matrimony *de præsenti*, and being convented by the Ecclesiastical Judge, did refuse to execute the sentence given by him, to celebrate the matrimony accordingly, after lawful admonition given in that behalf: he or she so refusing might, for their contumacy or disobedience therein, be excommunicated, and be imprisoned on a writ *de excommunicato capiendo*, until he or she did submit to obey the monition of the ordinary in that behalf." The proceeding is here spoken of merely as an enforcement of church discipline; not one word is said of the validity of the marriage contract being affected. And then he goes on to make this distinction: "But as for persons who had contracted spousals *de futuro* only, the Judge was not to proceed to the *significavit* into Chancery for an *excommunicato capiendo*, but rather to absolve that cursed party which contemned the censures of the church, albeit there might be no cause of favour, but for fear of further mischief by compelling them to go together which did hate one another. Yet was not this froward party thus to be dismissed, but was to suffer penance for the breach of his promise: nor was he or she to be dismissed or absolved, * if those spousals *de* * 590 *futuro*, by reason of carnal knowledge or some other act equivalent, did become matrimony; for in that case, as in the former where spousals were contracted *de præsenti*, the disobedient party was to be excommunicated, apprehended, and imprisoned; and not to be absolved or released before satisfaction, or death, or other just cause of divorce." There the distinction is clearly taken; one was a marriage, the other was not. In *Holt v. Ward*, which is referred to in Burn's Ecclesiastical Law, (b) the grounds of the jurisdic-

(a) Tit. Marriage, II. 5, p. 400, 2 edit.

(b) Tit. Marriage, p. 402.

tion of the Ecclesiastical Courts in marriage cases was discussed, and it was there said, (a) "The only reason why they hold jurisdiction in the case of a contract *per verba de præsenti*, was because that is looked upon amongst them to be *ipsum matrimonium*, and they only decree the formality of a solemnization in the face of the church." But where there is a contract only, as in the case of words *de futuro*, the Ecclesiastical Courts never decree the performance of any solemnity of marriage, but merely punish the party breaking a solemn promise, *pro salute animæ*.

The doctrine of the Ecclesiastical Courts is, therefore, uniform. It is true that one extraordinary case of *Scrimshire v. Scrimshire* (b) has occurred, but that does not affect the present, for the marriage there was in France, and ought to have been celebrated according to the law of that country; and the simple question was, whether it had been so celebrated or not.

It may now be convenient to refer to Bracton, who is a high authority. In the chapter on Dower he says, (c)
 * 591 that "whether the marriage is *per verba de * præsenti* or *per verba de futuro cum subsequente copula*, the marriage will be good as to her and as to the children, but that she will not be entitled to dower *ad ostium ecclesiæ*." This is an important point; for it seems to have been assumed in the Court below that the children would not be legitimate, which is certainly an error. *Bunting v. Lepingwell* (d) is either mistakenly reported or is erroneous: it is certainly on that point opposed to all other authorities.

[THE LORD CHANCELLOR. — What you object to in that case was merely said by the civilian in argument there.]

And it is not mentioned by Lord COKE in his report. There is another passage in Bracton, (e) which bears directly on this subject: "Hæres est legitimus quem justæ nuptiæ demonstrant sive clandestinum fuit matrimonium sive publicum,

(a) 2 Str. 937.

(b) 2 Hag. Cons. Rep. 395.

(c) Bk. 4, De Actione Dotis, p. 308.

(d) Moor, 169; 4 Rep. 29.

(e) Bk. 5, 419 b, 420 a.

sive per verba de præsentī sive per verba de futuro, sive sub conditione contractum dum tamen dissolvi non possit, nec in vita contrahentium fuerit dissolutum, cum sponsalia sive matrimonium sit conjunctio maris et feminae individuum vitæ retinens consuetudinem.” A similar doctrine is found in this author in various other parts of his work. (a) In all of them he shows that the marriages of the irregular kind are indissoluble, and that the children are legitimate. To the same effect is Fleta; (b) and also Britton, (c) who discusses the matter, and shows that though the mother, for not conforming to the rules of the church as to the ceremony taking place in the church, cannot claim dower *ad ostium ecclesiae*, yet that the children of such a marriage are esteemed legitimate.

* After these ancient writers, the grounds on which * 592 it is said that this marriage is not valid cannot be relied on. It is argued that this marriage is not sufficient for all purposes, — that the husband cannot receive administration of his wife’s estate; and for this *Haydon v. Gould* (d) is relied on. That case occurred after the Statute of Distributions. But what would be the principle of the Ecclesiastical Courts? They would say, “you have not obeyed the laws of the church, and therefore shall not be allowed to ask the church to assist you.” That is the utmost length to which the church could go, if it could go even so far as that: “for Haydon, demanding a right due to him as husband by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself in this case.” The whole case was therefore directed against the husband, who was the offender; and taking the law of that case to the utmost extent, it only amounted to this, that the husband being the wrong-doer to the church, was not to be assisted by the church. That is the view taken of the case in Comyn’s Digest: (e) “So by the common law, till the marriage be solemnized, the wife cannot be endowed *ad ostium ecclesiae*. So if the marriage be

(a) Bk. 2, c. 29, p. 63, De acquirendo rerum dominio; Bk. 4, c. 8, p. 303, and c. 9, p. 304.

(b) Bk. 5, c. 28, De Exceptionibus, pp. 353, 354.

(c) Ch. 107, De Exceptione de Concubinage, p. 258.

(d) 1 Salk. 119.

(e) Tit. Bar. & Feme, b.

not conformable to the ecclesiastical law, the husband shall have no right by the ecclesiastical law: as if the marriage be in a separate congregation, by their preacher, who is a layman, the husband will not be entitled to administration . . . Yet where there is a marriage in fact only, the wife, or her children, who were not in fault, may be entitled to a temporal right." This is the real distinction to be observed in deciding this case. In the argument of Mr. Jacob, in the Appendix to Roper's Husband and Wife, after speaking of the

* 593 * law of marriage with regard to dissenters, he passes to the consideration of Irish marriages, and says: (a) "The Irish Statute 21 & 22 Geo. 3, c. 25, was in form declaratory, but it is clear that it in fact introduced a new law. This appears from the previous Statute 11 Geo. 2. A learned writer before referred to, who states the general matrimonial law of Ireland to require the intervention of a priest, considers, indeed, that the marriages of dissenters had, before the Statute 21 & 22 Geo. 3, acquired validity for some purposes. He states that such marriages, if celebrated according to their own rites, and if both parties were of the same persuasion, were good to all civil effects; for instance, to support an ejectment where legitimacy came in question, or an action for criminal conversation; but that if they came to entitle themselves to any rights in the Ecclesiastical Courts, as to administration, they must prove a marriage according to ecclesiastical law." So that the distinction now contended for is admitted by Mr. Jacob himself; and in thus expressing himself, he cites *Haydon v. Gould*. It is extraordinary indeed that the common law should, for the purposes of the church, superadd, as a matter essential to the validity of the marriage, a ceremony which the Ecclesiastical Courts themselves have always treated as a matter the want of which does not vitiate the marriage, though it may subject the parties to ecclesiastical censure. And it is to be observed, that in the passage from Mr. Jacob's note just quoted, he refers the distinction rather to the rules of evidence than to the principles of law.

(a) Page 479.

Now, with respect to the question of dower. Dower was of two descriptions. In cases where the wife has not been entitled to dower, the dower claimed has * been * 594 of that sort known as dower *ad ostium ecclesiæ*. Blackstone, in enumerating the different sorts of dower, takes this *ad ostium ecclesiæ* first, and thus describes it: (a) “Where tenant in fee-simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (Sir EDW. COKE, in his translation of Littleton, adds) troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please, of his lands, at the same time specifying and ascertaining the same; on which the wife, after her husband’s death, may enter without further ceremony. 2dly. Dower *ex assensu patris*, which is only a species of dower *ad ostium ecclesiæ*, &c. In both of these cases they must (to prevent frauds) be made ‘in facie ecclesiæ et ad ostium ecclesiæ; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuere conjugia.’” That shows that though the wife cannot be endowed in this particular way, except at the church door, the marriage itself is good. The absence of the ceremony, the neglect of the orders of the church, entails a loss on one of the parties contracting marriage, but does not affect the validity of the marriage itself. *Wickham v. Enfeild* (b) shows what is the wife’s right to dower at the common law, the claim to dower there not depending on the endowment *ad ostium ecclesiæ*. When she proceeded for it, the issue joined, being *nunquam accouplé in loyal matrimoine*, would be one not triable at the common law, but by the ecclesiastical law. It was of course directed to the bishop.

[LORD CAMPBELL. — Not *accouplé* by a priest; but *accouplé*?]

That is so. The certificate of the bishop was, that she was *accouplé not en loyal matrimoine*, but *in vero matrimonio sed clandestino*. There was * error on that; and * 595

(a) Bk. 2, c. 8, p. 133.

(b) Cro. Car. 351.

the Court said, that as the bishop had returned the fact of marriage, that fact, though the marriage was clandestine, was sufficient to entitle the demandant to her dower.

[LORD CAMPBELL. — In that case, perhaps, the Ecclesiastical Court would have refused administration to the husband.]

Perhaps so; and probably it was to put an end to this sort of discretion claimed by the Ecclesiastical Courts that the Statute of Distributions was passed. There cannot be any doubt as to the meaning of the words *clandestinum matrimonium*. That must have been without the presence of a priest; but the return was held sufficient, and judgment for the dower was given.

[LORD CAMPBELL. — It would have been equally a clandestine marriage if a priest had been present or absent, provided the ceremony had not been performed in the face of the church.]

And no judicial presumption ought to be made that a priest was present at such a marriage, for such conduct would subject him to the severest punishments. But turning to the Common-Law Courts, it will be seen that in such circumstances the Courts have been in favour of the marriage. In all the cases now to be cited the question arose incidentally. In *Allen v. Gray* (a) there was no doubt as to the accoupling in loyal matrimony; but the plea was held bad, as it would send the question to be tried by the Ecclesiastical Courts; whereas the plea ought to have put the fact of the marriage into issue, and then the issue would have been tried by the Law Courts. *Norwood v. Stevenson* (b) was exactly to the same effect.

[THE LORD CHANCELLOR. — “Loyal,” as used in these cases, means “regular.”]

(a) 1 Show. 50; Comb. 131; 2 Salk. 437.

(b) Andrews, 227.

LORD CAMPBELL. — The Courts of Common Law * would not require more than the church ; so if the * 596 church did not require the presence of a priest to make the marriage valid, the Courts of Common Law would not require it.]

That strong observation runs through the whole of these cases.

[THE LORD CHANCELLOR. — The cases may not prove much, for you need not prove a marriage in fact, in an action on a bond.]

Yes, it must be proved if issue is taken on it.

[LORD CAMPBELL. — Undoubtedly.]

THE LORD CHANCELLOR. — Reputation would be sufficient proof for such a purpose.]

But that only shows that some sort of proof is necessary. The marriage must be proved, though the proof required in a particular case may not be the proof of the strictest kind. There are other cases on this point: *Jesson v. Collins* (a) is one. That was a motion for a prohibition to stay a suit for performance of a marriage, and Lord HOLT said a contract *per verba de præsenti* is a marriage, and is not releasable, but a contract *per verba de futuro* is releasable. Nothing is there said of the presence of a priest. In the next page is *Wigmore's Case*, (b) and Lord HOLT then repeats what he had before said. That was a case of an application to the temporal Court for a prohibition, and Lord HOLT said that the spiritual Court could not punish for fornication when the parties had married *per verba de præsenti*. The case is the stronger, for there the parties had got a license to marry ; but, being Anabaptists, they had no person in holy orders present, and no ceremony was performed according to the Church of England. That case shows clearly that the com-

(a) 2 Salk. 487; 6 Mod. 155.

(b) 2 Salk. 488.

mon law had not engrafted this necessity of the presence of the priest upon the ecclesiastical law.

* 597 * There are two notes of Lord HALE, which, it is asserted, show that he differed on this matter from the other great common lawyers. That is a mistake. The note on which reliance is placed on the other side is in Coke on Littleton, (a) where it is said, "A. contracts *per verba præsenti* with B., and has issue by her, and afterwards marries C. *in facie ecclesiæ*. B. recovers A. for her husband by sentence of the ordinary," which assumes that the first marriage is valid; "and for not performing the sentence he is excommunicated, and afterwards enfeoffs D., and then marries B. *in facie ecclesiæ*, and dies. She brings dower against D. and recovers, because the feoffment was *per fraudem* mediate between the sentence and the solemn marriage; 'sed reversatur coram Rege et Concilio quia prædictus A. non fuit seisitus' during the espousals between him and B. *Nota*: Neither the contract nor the sentence was a marriage;" and Lord HALE is referred to. That is not intelligible. The question was whether the husband was seised, not whether the marriage was a good marriage; and the judgment was that he was not seised: and on that and on no other question does the decision turn. The additional question is a mere piece of speculation of Lord HALE; and that it is so may be seen by the *quære* which he appends, "Whether husband shall have trespass *de tali uxore abducta*?" — a question about which nobody at this day would have any doubt whatever.

[LORD BROUGHAM. — What is a writ of error before the King in Council, on a writ of dower? There must be a mistake.]

There is no trace of this case except in the Year
* 598 Books, 9 & 10 Edw. 1; the reference in * Mr. Jacob's note to 10 Edw. 4, (b) being clearly a misprint. As-

(a) 33 a, note 10.

(b) Mr. Jacob's reference is borne out, so far as it can be, by D'Anvers's Abridg. of the Com. Law, Baron & Feme, A., § 21. Perhaps both were taken from the same source.

suming then the note to represent the facts truly, the inference attempted to be drawn from them is not warranted. The validity of the marriage appears to have been established, and the case was decided on the question of the seisin of the husband, and on that alone. Lord HALE is not, therefore, to be cited as an authority against the doctrine now contended for.

At this time there appeared to be much doubt as to the occasions on which a woman was entitled to dower: even dower at the common law was not given, in the time of Henry 3, to a wife, if she had been married in a chamber. She was required to be married in the church; but Perkins, who stated that case, added, "but the law is contrary at this day."

[LORD CAMPBELL. — That is as to the place where; not by whom, or before whom?]

That is so; and the authority for the statement seems to have been that of Bracton. The note in Lord HALE's MS. seems to refer to something in Edw. 1. Perkins, who says (a) that, "if a wife had married in a chamber, she would not have dower by the common law; but the law is contrary at this day," refers to the time of Henry 3. The case mentioned by HALE must have arisen in the common way, and have been referred to the Ecclesiastical Judges.

[LORD CAMPBELL. — The reference to the Council has been suggested to be a reference to the House of Lords, which sat with the Lords of the Council, attended by the Judges.]

It is probable that that was so. Roper shows (b) what was the law with * regard to Quakers' marriages. * 599 They were always held to be valid. In the first Institute there is another note of Lord HALE to this effect: (c) "Post affidationem et carnalem copulam sunt quasi husband

(a) Perkins, tit. Dower, § 306, p. 135.

(b) 2 Rop. Husb. & Wife, 463 *et seq.*

(c) 34 a, note (1).

and wife, and gift by him to the wife is void." That shows how Lord HALE regarded this sort of contract; namely, as an actual marriage. Bracton lays it down clearly, that after a contract *per verba de præsenti*, a gift or feoffment by the man to the woman is void. That can only be explained by the fact that the law treated that as a marriage. The same doctrine is laid down in Fitzherbert, (a) and he refers to the 16 Henry 3. Bracton (b) cites a case where the same point was held before the King at Lincoln. Perkins (c) admits the authorities, but says, "that at this day such a feoffment is good enough," and refers in like manner to Mich. 16 Henry 3. .

The King v. Luffington (d) is a case which occurred a short time before the Marriage Act, and goes to show that a marriage of this sort was valid; but it is hardly authority, since no actual decision was given on it. Still, however, that case shows that the Court thought that it would depend on particular circumstances whether a contract by present words might be a marriage, — a fact which proves that at that time the law was not considered to be opposed to the validity of a marriage so contracted. An authority, much relied on by the other side, was quoted in the argument below, (e) from the

Concilia of Wilkins, (g) where it was said that, by * 600 the Saxon laws, it was *declared that "At the nuptials there shall be a mass-priest by law, who shall, with God's blessing, bind their union to all prosperity." An allegation made by some critics, that Wilkins had been mistaken in this quotation, was noticed, and his authority was confirmed by a reference to a collection made by the record commissioners, and entitled "The Ancient Laws and Institutes of England, comprising the Laws enacted under the Saxon Kings, from Ethelbert to Canute," in which the very same words are to be found. Mr. Wilkins's accuracy of quotation may be confirmed by this reference; but these words themselves do not show that the presence of a mass-priest

(a) Fol. 16, § 117.

(b) Page 29, c. 9, De acquir. Rer. dom.

(d) 1 Wils. 74.

(g) Page 217.

(c) Page 87, § 195.

(e) Page 35, Dix's Report.

was necessary to the legal validity of the marriage. The presence of a priest may be proper and even desirable, and yet his absence may not affect the validity of the marriage. A marriage without his presence may be admitted to be irregular for ecclesiastical purposes, but it is not void for civil purposes: though the priest ought to give his benediction to a marriage, his presence is not necessary to constitute the marriage itself. Watson's Clergyman's Law (*a*) and Burn. (*b*) No attempt can be made to deny that the law was correctly laid down by De Burgh; all the other writers are to the same effect. In Walter (*c*) the law, exactly as given in De Burgh, is stated from Thomas Aquinas (in quatuor libros sententiar: Lib. iv. Dist. xxvi. Qu. unic. Art. 1): "Verba exprimentia consensum de præsentī sint forma hujus sacramenti, non autem sacerdotis benedictio quæ non est de necessitate sacramenti sed de solemnitate;" and from Duns Scotus, Lib. iv. Dist. xxvi. Qu. unic.: "Ut plurimum ipsimet contrahentes ministrant sibi ipsis hoc sacramentum vel mutuo vel uterque sibi." There *are many authorities to this effect; and from the period when *M'Adam v. Walker* (*d*) was decided, till this moment, it never appears to have been doubted. The only question was as to the evidence to prove the making of such a contract.

In the *Manipulus Curatorum*, (*e*) published in 1430, the reason for the law is given by Guido de Monte Rocherii: "Matrimonium dicitur multis modis. Nam matrimonium aliud legitimum, aliud clandestinum. Matrimonium legitimum est quando ab his qui super foeminam potestatem habent uxor petitur, et a parentibus sponsatur, et legibus dotatur, ac a sacerdotibus, ut mos est, benedicitur, a paranympis custoditur et solemniter accipitur. Non tamen intelligas quin sine solemnitatibus istis posset esse verum matrimonium. Sed sicut est in aliis sacramentis, quia quædam sunt de necessitate sacramenti, quædam de solemnitate tantum, ita et in matrimonio quædam sunt pertinentia ad substantiam matrimonii, sicut consensus per verba de præsentī expressus, et iste solum

(*a*) Page 146.(*b*) Tit. Ordination, § xi., p. 45.(*c*) Sect. 579 n.(*d*) 1 Dow, 148.(*e*) Sept. Tract. Pt. 1, De Matr. c. vi.

facit matrimonium;” — the last expression showing that consent, and consent alone, was of the very essence of the contract; the forms were not absolutely essential. But then he goes on to give the reason for which he should advise parties to marry in the face of the church, and says: “Quædam sunt ibi ad solemnitatem et decorem sicut solemnitatis prædictæ, sine quibus est verum et legitimum matrimonium quantum ad virtutem, licet non quantum ad honestatem. Clandestinum matrimonium est quod fit sine solemnitatibus prædictis, et qui sic contrahunt exponunt se periculo magno:

possit enim alter alterum dimittere quando vellet, et
 * 602 de facto cum alio vel alia contrahere, * et sic in adulterio manere. Unde talibus consulendum est in foro poenitentiae, ut de novo in facie ecclesiae contrahunt.” There is a similar passage in Zallinger, *Institutiones Juris Ecclesiastici*: (a) “Ex his deduces primo, valide contrahi coram parcho etiam non rogato ad assistendum, inducto per dolum, vi compulsio, invito et contradicente, aut affectante ignorantiam, ut si terga vertat, vel aures obturet, cum a partibus consensum præstari animadvertit.” This is decisive as to the object of the decree of the Council of Trent. That object was to secure evidence of the marriage; and the passage from Zallinger is very strong to show that it had no other, since even if the priest was brought to the place by contrivance, and affected to be ignorant of what was passing, his presence as a witness was obtained, and the marriage thereby became valid. And Ferraris (b) says that the marriage ought to be celebrated by the “parochus etiamsi non sit sacerdos,” the object being here distinctly avowed to secure sure and available testimony of the contract.

[LORD CAMPBELL. — Then according to the Roman Catholic law there might be a *parochus* not in orders for a year.]

There might: Walter is decisive on that point. If that was the case in Roman Catholic countries, it is impossible to believe that countries which did not accept the decree of the

(a) Lib. iv. tit. iii. § 69, n. 63.

(b) Encyc. Ecc. Imped. Matr. 130.

Council of Trent, should require the presence of a priest for a purpose more strictly ecclesiastical than that Council had in view. *Lord Herbert's Case* (a) affords clearly the distinction between a clandestine but valid marriage, and a marriage legal in its ordinary form. By the law of Sicily a marriage, contracted as it was there, namely, in a * clan- * 608 destine manner, was the object of punishment to the individuals so contracting it, for violating the law by making a secret marriage; but Lord STOWELL said that that did not affect the validity of the marriage. In *Zallinger* (b) it is said, "*Munus parochi matrimonio assistentis situm non est in actu quodam ordinis, aut exercitio propriæ jurisdictionis, sed in præsentia ipsius tanquam testis specialiter autorizati, ut de initio contractu testimonium det ecclesiæ;*" in this manner confirming his previous statement, that the object of the church was to secure a witness.

[LORD CAMPBELL. — Like the case of a notary.]

In no other manner; and in one of the cases it appears to have been said that it was necessary to have a priest present at the making of a will, — a proposition which, strictly taken, could never be seriously entertained by any one. There is another case of high authority. It is to be found in the *Memorials of Cranmer by Strype*, (c) and is thus stated: "The Lord Cromwell did use to consult with the archbishop on all his ecclesiastical matters, and there happens now, while the archbishop was at Ford, a great case of marriage; whom it concerned I cannot tell, but the king was desirous to be resolved about it by the archbishop, and commanded Cromwell to send to him for his judgment therein: whether a marriage contracted or solemnized, in lawful age, *per verba de præsentì* and without carnal copulation, be matrimony before God or not? What the woman may thereupon demand by the law civil, after the death of her husband? The archbishop, who was a very good civilian as well as a divine, but that loved to be wary and modest in all his dealings, made this answer:

(a) 8 Phill. 58; 2 Hagg. Cons. Rep. 263.

(b) Bk. iv. tit. iii. § 68.

(c) Vol. 1, c. 12, p. 45.

‘That he and his authors were of opinion that matrimony contracted *per verba de præsenti* was perfect * 604 matrimony before God, but he knew not what she could demand by the law, for that all manner of causes of dower be judged within this realm by the common law of the same;’ warily declining to make any positive answer on a matter so ticklish.” The Statute of Henry 8 puts marriages *per verba de præsenti*, followed by carnal knowledge, on the same footing as marriages *in facie ecclesiæ*, followed by carnal knowledge; which seems to have been considered in both cases as requisite to the perfection of the marriage. Yet it is known that that was not the law, as the words of the question to the archbishop, and his answer, most plainly show.

The cases of the Quakers’ marriages are most important. The issue of such marriages has never been said to be illegitimate. As to the question of the refusal to give the husband administration, that depends on another ground, and so does the matter of the claim of the wife to dower. It depends, and is completely to be accounted for, on the principle of the Ecclesiastical Courts refusing to give their assistance to enforce rights which have not been acquired in strict obedience to the ecclesiastical laws. The refusal does not show that the rights themselves are not valid, but is directed to punish those who have not obeyed ecclesiastical discipline. The 26 Geo. 2, c. 33, contains an exception as to Scotland, Quakers, and marriages beyond the sea. That exception left all these marriages to be dealt with as before the passing of the Act.

[LORD CAMPBELL.—There was as little legislation as to them as there was with regard to marriages in Scotland.]

It is so; and the only Act that at all dealt with their marriages is that which relates to the tax payable by married persons. Then how did these marriages stand? if * 605 void, they must * have been constantly coming before the Courts. The Crown, if the marriage was not lawful, would have been held entitled to the real and personal property of the deceased; but such property was never taken

by the Crown. Several of the authorities on this subject are collected by Dr. Haggard; (a) they prove the validity of these marriages. It is said that the marriages of Jews are valid, because they are looked on as a foreign people; but the Quakers are English subjects, and if their marriages are valid, they must be so by the law of England. In 1661, a Quaker marriage was held valid, in an action of ejectment; and in *Harford v. Morris* an action of crim. con. was said to have been held maintainable. In *Dodgson v. Haswell* a contract of that sort was held valid.

In the 6 & 7 W. & M., c. 6, entitled an Act for carrying on the war with France with vigour, which is not printed in any of the modern editions of the Statutes at Large, is an enactment relating to the marriages of Quakers. It is in these terms: after reciting the existence of Quakers' marriages and imposing a tax on married Quakers, it provides that "Nothing herein contained shall be construed to make good or effectual any such marriage or pretended marriage, but that they shall be of the same force, and no other, as they would have been if this Act had never been made." That statute, like that of the 26 Geo. 2, left them untouched. Their validity has never been doubted, property has descended to the issue of such marriages, and it is therefore clear that they must have been valid by the common law, and in no other way. In Buller's *Nisi Prius* (b) it is stated that in an action for criminal conversation, it is sufficient to prove * the * 606 marriage according to the form of the Quakers. The form of such marriages is given in Shelford (c). This matter has been from time to time under the consideration of many of the Common Law Judges. Lord HOLT's opinion, in *Jesson v. Collins* and in *Whigmore's Case*, has been already cited. In *Reed v. Passer* (d) the question arose before Lord KENYON. In *Reg. v. Brampton*, (e) the opinion of Lord ELLENBOROUGH and the other Judges was given; and in *Latour v. Teasdale* (g) the whole matter is discussed. That

(a) 1 Hagg. Cons. R. App. p. 9.

(b) Page 28.

(c) On Marriage and Divorce, p. 65.

(d) 1 Peake, 231, 1st ed.; 803, mod. ed.

(e) 10 East, 282.

(g) 8 Taunt. 830.

case was argued by the present Lord Chancellor, who, at the conclusion of his argument, said: "The law is distinct and uniform; a marriage *per verba de præsenti* was a marriage without the intervention of a priest. It is unnecessary to enter on doubted points, whether dower, community of goods, &c., follow on a marriage without a priest; the question here is whether this was a legal and irrevocable contract, not whether all the consequences follow." And Lord WYNFORD, who argued on the other side, only raised the point whether the parties carried to Madras the law of England; for he admitted that if they did, the marriage was valid. And Lord Chief Justice GIBBS said: "It follows from what I have stated that this was a legal marriage, since it was a marriage between British subjects, celebrated in a British settlement according to the laws of this country as they existed before the Marriage Act, and which, if it had been celebrated here before that statute, would have been valid."

In *Beere v. Ward*, Lord TENTERDEN's opinion, according to a note of one of the counsel in the cause, (a)
 * 607 * was given distinctly to this effect: "The marriage might lawfully be celebrated in a way in which the proof of it would be extremely difficult; that might be, for it might be celebrated at any time and in any place by a clergyman; nay, as I understand the law, it might be equally celebrated without a clergyman: for a declaration by the parties, in the form of a contract, that they were man and wife, a contract *per verba de præsenti* made between them, and a declaration of that in the presence of witnesses, would, at that time, have made a good and lawful marriage in England, as it does now in Scotland."

[LORD DENMAN. — I was in that case, and the Lord Chancellor was on the other side. On our side we objected that Lord TENTERDEN said that the marriage law of England and Scotland had been the same. We insisted that that was not so, for that the law of Scotland allowed of legitimation by a subsequent marriage, which we said had never been allowed in England.]

(a) Mr., now Mr. Serj., Clarke.

The legitimacy there was admitted when the fact of marriage was shown to be capable of proof, and the parties claiming under the marriage received all that they could receive; they obtained the land on the footing of that legitimacy. These authorities show that wherever the question has come before the great common-law authorities, they have been of opinion that such a marriage was valid. The same doctrine has been laid down by the greatest Judge of the Ecclesiastical Court, Lord STOWELL, not only in *Dalrymple v. Dalrymple*, but in *Lindo v. Belisario*. The decision in the former case was not an *obiter dictum*; it was the clear, considerate, and deliberate opinion of Lord STOWELL; and the first instance in which it has been questioned and treated as an *obiter dictum* is in the note by Mr. Jacob, in his edition of Roper's Law of * Husband and Wife, (a) * 608 where the question now presented to the House was for the very first time raised in the profession.

Then comes the question whether the second marriage is void or voidable. It is void. Though it is a hardship, still the law declares that the children of such a marriage are illegitimate. It may be admitted that there are *dicta* which appear to raise a doubt upon this subject, but they only appear to do so. In the cases which declare a subsequent marriage void, the word used is precontract, which is put on the same footing as affinity and consanguinity, that is, as something which renders void a contract made in spite of it.

[LORD CAMPBELL. — There is great confusion in it. The word precontract may mean a mere contract to marry, or a contract of marriage.]

It is so; and the suits in the Ecclesiastical Courts raise no decisive argument on the point; for if there have been suits there to declare such marriages void, there are equally instances of suits of the same sort in the Ecclesiastical Courts where the first marriage has been not merely a precontract, but has taken place *in facie ecclesiæ*. In *D'Anvers* (b) the

(a) Vol. 2, p. 445, Adden.

(b) *D'Anvers*, Bar. & F. § 21.

law is distinctly stated thus: "If A. contracts himself to B. and after marries C., and B. sues A. upon this contract in the spiritual Court, and there sentence is given that A. shall marry and cohabit with B., which he does accordingly, they are baron and feme without any divorce between A. and C., for the marriage between A. and C. was a mere nullity." And he refers to cases in support of this doctrine, and remarks that in one of them C. was no party to the suit; and it was held that the second marriage was void.

* 609 [LORD * CAMPBELL — The only doubt about that case arose from the equivocal nature of the statement of the first marriage. The words *prout femme* show nothing.]

But the case states that the parties promised under age, and had carnal knowledge at full age; which shows that it must have been a mere betrothment in youth, and a fulfilment of the contract in full age.

[LORD BROUGHAM. — But what are the relative rights of the Presbyterian ministers in Ireland?]

They are Protestant dissenters. *Kemp v. Wickes* (a) shows that in the case of Protestant dissenters, "the Toleration Act allowed them publicly to exercise their worship in their own way, under certain regulations: it legalized their ministers; it protected them against prosecutions for nonconformity;" and therefore, as Sir J. NICHOLL there said, "it could not any longer be said that rites and ceremonies performed by them are not such as the law can recognize in any of his Majesty's Courts of Justice, provided they are not contrary to nor defective in that which the Christian church universally holds to be essential; that is, provided they are Christian."

One important point would be to ascertain for what purpose the minister was to be present. If for the purpose of attestation, one would do as well as the other. But at all events, after the union of the two kingdoms, and after the

(a) Rogers's Ecc. Law, 70-594; 3 Phill. 264, 298.

statutes passed on that subject, it must be taken that the Presbyterian ministers possess authority sufficient for purposes of this sort. The fact that on many occasions Acts of Parliament have been asked and obtained to remove doubts as to marriages cannot be used to show that this marriage is invalid. If used at all, that fact would show that * the marriage was valid, for the legislature would not * 610 have consented on so many and such various occasions to say that doubts had arisen, and to declare those doubts erroneous, if in fact they had been such as the law did recognize as well founded.

[LORD BROUGHAM.—I have communicated with Sir JOHN NICHOLL on the subject of *Babington v. Babington*, (a) and I have received a note from him to this effect: That the marriage was stated, on the face of the record there, to have taken place in the face of the church; but these words were struck through by the Judge before sentence. This was done because he could not, as an Ecclesiastical Judge, say that the marriage had taken place in the face of the church when it was not the Church of England; and he could not say according to the Church of Scotland, because what was the rule of that church was not proved before him as a matter of fact. So that no question of *lex loci* was raised there.]

On all the authorities now referred to, on the practice of the country and the profession, and on these frequent recognitions by statutes, it is confidently submitted that the first marriage here was valid, and that judgment must be given for the Crown.

Mr. Pemberton, for the defendant in error.—There is one circumstance which has not been adverted to on the other side of the bar; namely, that this is not a marriage between two members of the Presbyterian church, but it has been solemnized, if at all, by a member of a church to which neither of them belonged. This circumstance would mate-

(a) Not yet reported.

rially affect the validity of the first marriage under any circumstances: but it is submitted that, without going * 611 into * that question, that which is here called the first marriage was not valid in law. The argument on the other side goes to this extent, — that a marriage may be solemnized without any religious solemnity at all. This law is said to extend to Scotland, Ireland, and all the colonies of this country: and this argument rests altogether on the authority, and greater it is admitted there cannot well be, of Lord STOWELL. It has been assumed that the authority of that learned Judge was never questioned till the note to Roper's book, by Mr. Jacob, was published. But that is a mistake; for learned as that note is, the whole of its learning may be found in the arguments of counsel in the case of *Beere v. Ward*. In that case there was a clandestine marriage, a regular but secret marriage, in 1742. A child had been born in 1739. The legitimacy of that child was in question. It was said that a marriage had taken place in 1736. It was necessary to make the forms of that marriage as few as possible. Lord ELDON refers, in the beginning of his judgment, to the way in which the then Attorney-General opened the case to the jury, and makes the following observations (a) on the law which had been laid down to the jury.

(a) The case of *Beere v. Ward*, which was compromised before the delivery of final judgment, was never published in the professional reports of the Court of Chancery. The opinions of Lord ELDON, as expressed on his granting a new trial in that case, were very much referred to in the arguments in the present case in the Court below, and became again the subject of comment in this House. The reports of these opinions were found only in the newspapers of the day, which were accordingly quoted; and it has, therefore, been deemed advisable to extract so much of them as applies to the particular point now under discussion: —

“ Lord ELDON said, an application was now submitted for a new trial, and the principal ground on which it rested was the misdirection of the Judge in point of law. His Lordship then referred to the address of the Attorney-General to the jury, and to the speech of the learned Judge in charging the jury with reference to the legal question. That learned Judge had stated that, as he understood the law at that period, a good marriage might be celebrated without the intervention of a clergyman; and he (Lord ELDON) thought that it would be extremely dangerous to

Lord TENTERDEN on that occasion had stated the law to the full extent of *Dalrymple v. Dalrymple*. But * in his judgment Lord ELDON does not quite adopt * 612 the law from Lord TENTERDEN, but says, that loose as

deny that such might have been the law at that period. It was to be observed that the remark of the Chief Justice applied to marriages *per verba de futuro*, and not *per verba de præsenti*; for, according to the learned Judge, there must be a cohabitation, and a subsequent declaration in the presence of witnesses. This proposition had been met at the bar, by stating that such a marriage was not at that period a good and lawful marriage. The objection was in substance that it was, as the Solicitor-General put it, 'bad law.' The Solicitor General had cited a variety of authorities, and contended that though the marriage was good for some purposes, yet, to render the children legitimate, it must be a marriage *in facie ecclesiæ*." — *Morning Chronicle*, Thursday, 6 May, 1824.

The Court broke up before the delivery of the judgment was finished, and on the Friday morning (7 May) it was resumed; and then, after going through all the facts of the case, Lord ELDON said that, "under all the circumstances a trial at bar was, in his mind, the most advisable course to pursue. The opinion of the Judges upon the point of law might then be obtained, and the facts of the case would then be thoroughly and entirely understood." — *Morning Chronicle*, May 8.

"Lord ELDON here read and commented upon that part of the Chief Justice's charge which relates to the law of marriage in this country, before the passing of Lord HARDWICKE's Act. In stating that our law was the same as the law of Scotland, he was inaccurate; for it never was so loose as the law of Scotland; but that was unimportant. That a marriage might have been celebrated without the presence of a clergyman, was a proposition that, with some qualification, it was difficult to deny; that was where the person performing was supposed really to be a clergyman. The case was different where a fraud was intended by one of the parties. The Chief Justice's charge went on to say that 'a contract between the parties, followed by cohabitation, and accompanied by a declaration in the presence of witnesses, constituted a good and legal marriage at that period of our history, as it would in Scotland at this day.' There was no doubt that that would constitute a good marriage at present in Scotland, as was established in a case the other day in the House of Lords, where it appeared that the husband said in the presence of witnesses, 'Madam, I acknowledge you to be my wife;' and she replied, 'Sir, I acknowledge you to be my husband.' In a few moments afterwards the husband went into another room and blew his brains out. That was held to be a valid though irregular marriage by the law of Scotland; he said *irregular*, because there was a difference between a *valid* and a *regular* marriage. It was contended in the present case that the attention of the jury ought to have been called to this question: 'Are

the law of England was, it was not so loose as the law of Scotland.

It may be true that the canon law was the basis
* 613 * of the marriage law throughout Europe ; but there were qualifications in some countries. What were

they in England, with respect to the adoption of the canon law ? It is said on the other side that it lies on those who dispute the canon law to show where it came into conflict with the municipal law. This is not so : the burden of showing that the canon law was received, and how far received here, lies not on the defendant, but on the other side : and the difference between the canon law itself and the adoption of that law in this country is the meaning of the phrase, " The King's Ecclesiastical Law." (a) And the subsequent passages from Lord HALE and Sir J. DAVIES (b) justify this : " And to show how the canon law was introduced into England, and what person of right could dispense

with the ecclesiastical law in this case, before the mak-

* 614 ing of the Statute of Faculties ; it was * observed that, after the Bishop of Rome had assumed to himself to be the spiritual prince or monarch of all the world, he attempted also to give laws to all nations, as a real mark of his monarchy ; and for this he caused certain rules to be collected for the government of his clergy only, which he called *decreta*, and not *leges* or *statuta*. But these were not entirely and absolutely obeyed in any part of Christendom, but only

you sure, according to the evidence, that such a contract had been so made between these parties ? ' And it was said that the principle laid down by the Chief Justice was bad law. Cases were cited to show that though a contract of marriage *de præsenti*, before the year 1756, was a good contract (to use the Solicitor-General's words) *quoad hoc*, yet it was not a legal and valid marriage of itself ; that was, that the issue of such marriage, if the parties were not afterwards compelled to celebrate it *in facie ecclesiæ*, were illegitimate. Now he (the Chancellor) was not considering the question yet ; but it seemed to him that another point arose, if that proposition were made out ; namely, whether a second marriage, if celebrated voluntarily, would not have the same effect in curing the other, as if its celebration had been made compulsory by the Ecclesiastical Courts." — *Times*, 6 May, 1824.

(a) Caudrey's Case, 5 Rep. lrv.

(b) Rep. tit. Commenda, 190.

in the temporal territory of the pope, which was called by the canonists *Patria obedientiæ* : but on the other part several of these canons were utterly rejected and disobeyed in France and England, and other realms, which are called *Patriæ consuetudinariæ*. . . . All the ecclesiastical laws of England were not borrowed from Rome ; for long before the canon law was authorized and published (which was after the Norman Conquest, as is shown before), the ancient Kings of England, Edgar, Athelstan, Alfred, Edward the Confessor, and others, have, with the advice of their clergy within the realm, made divers ordinances for the government of the Church of England ; and after the Conquest divers provincial synods have been held, and several Constitutions have been made in both realms of England and Ireland, all which are part of our ecclesiastical laws at this day." This passage was properly commented on by Mr. Justice CRAMPTON, (a) as showing that what the ecclesiastical law in England is must be decided by our own writers and our own authorities, and cannot be settled by reference to foreign jurists.

What is now proposed to be shown is this, that the ecclesiastical law of England never did recognize a marriage as a lawful marriage which was not celebrated * by a priest. A marriage consists of two parts : a * 615 contract, which being made, the marriage was perfect as between the parties themselves. That is the first part. But the second part is solemnization, and that is as necessary as the contract ; and till solemnization the law never gave effect to the marriage for the purpose of conferring civil rights. The distinction between contracts executory and executed is admitted. They form a well-known branch of the law of England, and the executory contracts confer, as do marriage contracts, certain rights on each of the contracting parties, but they are altogether wanting in many of those particulars which distinguish a complete and perfected contract.

When the contract was made *per verba de præsentî*, or *per verba de futuro cum subsequente copula*, no valid marriage

(a) Dix Rep. 249.

could be subsequently contracted. The marriage was complete as between the parties themselves, but no further; but the parties obtained no civil rights till the church had solemnized the contract.

[LORD CAMPBELL. — The contract *per verba de præsenti* was indissoluble of itself; the contract *per verba de futuro* only became indissoluble after a *copula*; was it not this latter that was merely an executory contract?]

That may be admitted as between the parties themselves. Such a contract, it may be said, would, before the statute, have prevented a subsequent valid marriage, for it became, so far as they were concerned, an indissoluble contract. It therefore makes the second marriage voidable, but not void. But for many purposes both contracts are merely executory. The only right which the marriage *per verba de præsenti* on the one hand, or the executory contract executed by the *copula* on the other, gave, was this, that the contract

* 616 as between * the parties was complete, but that, till the solemnization, the marriage was not a perfect valid marriage for any other purpose. It was not like the case of a clandestine but regular marriage. There the sentence was not *quod subiret matrimonium*; but such was the sentence in either of the two cases already supposed. But if the party remained obstinate, that sentence did not make a marriage. The parties could not cohabit; or if they did without first obeying the sentence, that is, marrying in the face of the church, the issue was illegitimate. But where a party had contracted with one *per verba de præsenti*, and then married another in the face of the church, this second marriage in the face of the church was, till suit and sentence on the first contract, a good and valid marriage, and the party under the first had no civil rights whatever; and if one of the two parties to this second marriage died before any sentence pronounced, the marriage was good notwithstanding the previous contract, and the issue would inherit. When the statute took away from the Ecclesiastical Courts the power of enforcing the performance of a precontract by a marriage *in facie ecclesiæ*, it

did not do any thing so absurd as to leave the party at liberty of his own free will to do what it prevented the Courts from doing ; namely, render a marriage in the face of the church void, by solemnizing there the precontract.

This was the view taken of the subject in the Ecclesiastical Court. How did the common law regard such a marriage ? it never regarded it as a marriage till solemnization, but only as a contract for breach of which either party might recover damages. It is said that it was the general doctrine of the canon law that a marriage might be good without the presence of a priest. How is that shown ? The civil law prevailed * in countries where the canon law was re- * 617 ceived ; and the popes, by decree after decree, but in vain, required religious ceremonies to give validity to the marriage, until the decree of the Council of Trent was passed ; and when that was passed, the countries that received that decree submitted. In France, which did not receive that decree, the kings issued ordinances to a similar effect. What was the case with England ? The statutes published by the Record Commissioners, of the Saxon laws in the year 940, show (a) that, “at nuptials there shall be a mass-priest by law, who shall by God’s blessing bind their union to all prosperity.” In 1076, (b) ten years after the Conquest, the canons at Winchester were declared, by Lanfranc, in these terms : “Further it is ordained that no man do give his daughter in marriage without the priest’s benediction. Other marriage shall be deemed fornication.” In 1775 there was another canon : (c) “Let no faithful man of what degree soever marry in private, but in public, by receiving the priest’s benediction. If any priest be discovered to have married in private, let him be suspended from his office for three years.” In 1200, (d) Archbishop Walter, in his Constitutions, declared, “Let no marriage be contracted without banns thrice published in the church, nor between persons unknown. Let none be joined in marriage but publicly in

(a) Pages 108, 109.

(b) Johnst. Ecc. Law, A.D. 1076, § 5.

(c) Johnst. Ecc. Law, A.D. 1175, § 17.

(d) Johnst. Ecc. Law, A.D. 1200, § 11.

the face of the church; otherwise let it not be allowed of, except by the special authority of the bishop." In 1160, Pope Alexander issued edicts in which marriages without the presence of a priest were declared good; but

* 618 almost immediately afterwards came the canons already cited, to guard against the abuse of the per-

mission thus given by the pope. But from what follows it is clear that the law which admitted the canon law in other countries, as part of the law of the land, was never adopted in England. In 1253 the attempt was made to introduce the canon law of marriage recognized by the popes, against the ecclesiastical law of England; and the answer was the well-known answer, that the barons would not consent to have the laws of England changed. At that time, before whom would the question of the validity of marriage come for decision? It would come before those Courts which had issued those canons; before that very Lanfranc who had said that a private marriage would be only fornication. What certificate would the bishop have returned in that case? It must have been an answer conformable to these Constitutions. Glanville, speaking between 1154 and 1189, states that the inquiry of bastardy and of marriage shall be before the bishop, and that the law was not that which was established in 1153. In Beames's edition of Glanville (*a*) it is said, "If any one claims an inheritance in the character of heir, and the other party object to him that he cannot be heir because he was not born in lawful wedlock, then indeed the plea shall cease in the king's Court, and the archbishop or the bishop of the place shall be commanded to inquire concerning such marriage, and to make known his decision either to the king or his justices." And then he gives the writ. So that it was

the ancient ecclesiastical law of England, founded on
* 619 the common law, that was recognized here before the promulgation of the canon law. That law treated marriage as a religious solemnity, without which marriage could not be completed. The canon law as such, and unmodified by our municipal law, never was the law of England. If the

(*a*) Page 181.

religious ceremony was a mere matter of order and form, how could that have affected the validity of the marriage; how could it have made the parties guilty of fornication? When did it become matter of order merely? No satisfactory answer can be given to that question.

[LORD CAMPBELL. — It is difficult to suppose that the question of marriage was wholly referred to the bishop in the ancient Saxon times, for in those times the bishop and the earl sat together in the county court.

THE LORD CHANCELLOR. — We do not know for what purpose the bishop sat there, whether for any special purpose or for general purposes.]

In Merlin (*a*) the history of these decrees is shown; and finally the Council of Trent published that decree which required not the presence of a priest merely, but that of the parish priest. But though the ecclesiastical law as to the necessity for the presence of a priest might have fallen into frequent desuetude abroad, it did not fall into desuetude in England. The Constitution of Archbishop Reynolds (*b*) in 1322 says, "Let matrimony be celebrated as other sacraments are, with reverence, in the day-time, and in the face of the church, without laughter, sport, or scoff. Let the priest, while the marriage is contracting, interrogate the people," &c. This assumes the necessity of the presence of a priest; and it adds, "Let the priests often forbid such as are * disposed to marry to plight their truth anywhere but * 620 in some notable place, before priests."

[LORD COTTENHAM. — Does it not add, "or public persons?" (*c*)]

(*a*) Repertoire, tit. Marriage, sect. ii. § 1.

(*b*) Johnston's Ecc. Law, A.D. 1322, § 7.

(*c*) Johnston prints the Constitution thus: "before [priests, or] public persons;" and adds this note: "Priests are not mentioned by Lyndwood. A contract *in præsenti* was absolutely obliging, as it still is, if made before any two good witnesses; and Lyndwood, by 'public persons,' understands any two such witnesses in a public place."

Yes, but that was as to the espousals, not the marriage.

In 1343 is a Constitution of Archbishop Stratford, in these terms: (a) "The lust of men is most prone to what is forbidden; therefore, persons too near akin, or who cannot *de jure* be married on account of other impediments, yet often desire to be married *de facto*, that under colour of matrimony they may fulfil their unlawful desires;" and it then goes on to require the publication of banns in the parish where the parties are, making many other provisions and declaring many penalties, but in all assuming the necessity for the presence of a priest at the marriage.

In Archbishop Zouche's Constitution, in 1347, it is said, (b) "although the sacred canons forbid clandestine marriages;" and it then goes on to provide that chaplains who celebrate such marriages, that is, marriages without publication of banns, shall be punished. In this, as in all the rest, the necessity for the presence of the priest is assumed; and the only purpose of these Constitutions is not to secure his presence, for his absence never seems to have been thought of, but to compel him, notwithstanding any wishes of the parties, duly to observe the laws of the church.

These Constitutions show that that law which had
 * 621 * prevailed never had fallen into desuetude, and that the abuses consisted not in celebrating marriages without a priest, which could not be done at all, but in the assumption of that character by those who had no right to assume it, or in the neglect of the due observances of the church. Why should parties have gone away from their own parishes, why have got men to assume the habits of priests who were not priests, if the marriage would have been perfectly valid by a simple contract *per verba de præsenti*, in the presence of any ordinary witnesses?

[LORD CAMPBELL. — Without the presence of a priest, they would have subjected themselves to ecclesiastical censures; what they did might be to avoid that danger.]

(a) Johnst. Ecc. Law, A.D. 1343, § 11.

(b) Johnst. Ecc. Law, A.D. 1347, § 7.

That alone will not explain the matter. Suppose a marriage by contract to be good and perfect in itself, any subsequent marriage would be null and void, and in case of desertion the wife would be entitled to sue for restitution of conjugal rights; and the judgment, founding itself on the marriage, would be to grant the prayer of the suit. But if celebration by religious rites is necessary, these consequences would not follow a marriage by mere contract; and in the event of a second marriage in the face of the church, and then of a suit for the performance of the first marriage, the judgment would be that the second marriage was bad. But no instance can be produced in which such a judgment has been given; on the contrary, where the contract has been made not in the face of the church, the judgment has been that the party *subiret matrimonium*, which would have been absurd had the *matrimonium* been already complete. What has been the practice of the law on this point? In *Babington v. Babington* there was a valid Scotch marriage, and the subsequent marriage was therefore void.

[LORD BROUGHAM. — But if that case had * depended * 622 on the *lex loci*, the marriage ought to have been pleaded as valid on account of the law of Scotland, not as valid *in se*. The Scotch law was distinctly pleaded in *Dalrymple v. Dalrymple*, and the issue was raised on that plea.]

By the paper here given (see *ante* 610), it appears that the woman there did plead a marriage in Scotland, valid by the laws of Scotland. It was for that very reason that the sentence could not decree it to be a good marriage *in facie ecclesiæ*, for that could only be said by our Ecclesiastical Courts of the Church of England. The word “solemnized” was left in, because it had been solemnized in the face of a church, according to the law of the country where that church was the established church. This illustrates, in the strongest degree, the difference between an irregular marriage and a contract which did not amount to a marriage. In *Fitzmaurice's Case*, (a) the

(a) MS. case before the delegates, 14 March, 1732; 1 Lee Rep. by Phill. 28, n.; cited by Lord STOWELL, 2 Hagg. Cons. Rep. 69, 100.

sentence declared that the marriage was good and valid. It declared that the parties had, by fit and proper words *de præsenti*, entered into and solemnized and consummated a marriage, so far as the contract was concerned. In all the cases, the sentences are that the matrimonial contract is perfect as a mere contract between the parties; but then they direct solemnization, which shows that without that ceremony the marriage is not perfect and complete for all purposes. In *Baxter v. Buckley* (a) the marriage took place in a regular manner, except that the person who celebrated it was an innkeeper. The decree was not that the marriage was a perfect marriage,

but that Buckley should be enjoined to solemnize the * 623 marriage within sixty days after monition. In * the

Clerk's Instructor in the Ecclesiastical Courts, (b) is the form of an order on a marriage of that sort. It is to this effect: Where there is a certificate of the party's disobedience, then an *excommunicato capiendo* shall issue, which shall be directed to the sheriff, who shall take the party and keep him in prison till obedience done; and when the church and the party suing are both satisfied, then is the officer to certify to the bishop that obedience has been done by the contracting spouses of matrimony; and the prayer of a suit in such a case is that the defendant may be decreed to complete and perfect the contract of marriage, under penalty of excommunication. Swinburne (c) shows that that was all the Ecclesiastical Courts could do. So that wherever there has been no interposition of a priest, the sentence is to solemnize the marriage; but if the marriage has taken place before a priest, then the sentence is to perform its duties. The single decision, properly so called, that a contract *per verba de præsenti* is *ipsum matrimonium*, is that of *Bunting v. Lepingwell*. (d) Both the reports of Lord COKE and of Moor must be looked at; for the arguments are in one, and the judgment in the other. In Moor the facts are thus stated: "Bunting contracted himself to one Agnes Adingsel, and then Agnes was married to one Twyne and cohabited with him, and after-

(a) 1 Lee Rep. by Phill. 42.

(b) Page 813.

(c) Page 231.

(d) 4 Rep. 29; Moor, 169.

wards Bunting sued the said Agnes in the Court of Audience and proved the contract; and for that the said Agnes could not show cause to the contrary, the sentence was pronounced that she shall espouse the said Bunting and cohabit with him, which she did. They had issue one Charles Bunting, and the father devised, &c. The question was whether

* Charles, their issue, was heir to Bunting; and the * 624 point in the King's Bench was this, whether the espousals between Bunting and Agnes were lawful (loyals), without divorce between Twyne and Agnes, and without requiring Twyne to answer whether he had any thing to say why Bunting and Agnes should not be married." And then follow all the arguments, both as to the previous contract and as to the faith which ought to be given to the judgment of the Ecclesiastical Court; and finally it was adjudged that Charles, the issue of Bunting and Agnes, was legitimate. If the first marriage there made a good marriage, the second was actually null and void. The solemnization ordered by the Court was therefore needless and good for nothing; yet the whole of the argument went on the sentence of the Ecclesiastical Courts. What was the reason of this judgment? It was not given thus because the contract was a marriage in itself, but that it was made a marriage by solemnization, and there was the sentence of a competent Court, in a matter over which it had jurisdiction. The civil lawyer who argued the case there expressly declared that a pre-contract did not make a subsequent marriage void *ipso facto*, but was only good cause to avoid such a marriage, and that it was needless to summon Twyne in the suit against Agnes, because the first contract had disabled her from making a contract with or espousing any other man, and that *ubi nullus habitus ibi nulla privatio*; and finally, because the Ecclesiastical Court, having jurisdiction in the matter, must be presumed to have exercised the jurisdiction properly. The decision was not that no sentence was necessary, but that being the sentence of a Court of competent jurisdiction, it was good. This case therefore proves, first, that the contract did not make the marriage; secondly, * that the solemnization was necessary; and * 625

thirdly, that the solemnization could not be had but upon the sentence of a Judge. When, therefore, this case comes to be properly considered, it is an authority against the Crown in the present argument. In *Paine's Case*, (a) "Serjeant WINDHAM said, that if a man contracts with a woman to marry her, and afterwards he marries himself to another woman, and the first woman sues him in the spiritual Court, and by sentence there the marriage is adjudged null, that the man and the first woman are thereby baron and feme; and this, he said, NOY, Attorney-General, had held in Mr. Harrison's reading in Lincoln's Inn; for that, by this sentence, the man and the first woman were complete man and wife, without further ceremony: but TWISDEN, J., denied it, and said that the marriage ceremony must be solemnized before they could be completely baron and feme." Is not this a decisive authority? The declaration of Serjeant WINDHAM, founded, as he says, on Attorney-General NOY's holding in a reading at Lincoln's Inn, is precise, but the contradiction from the Bench is clear and positive; and that contradiction is in accordance with all the authorities. On the whole, it is clear that the first contract was not a marriage, but was a contract which prevented another marriage, but which itself still required to be perfected by solemnization before it became a perfect marriage. And Lord HALE's opinion is to the same effect. (b) Nothing can be more distinct than this declaration of Lord HALE's opinion, and the question of marriage is here considered with reference to one of its most important consequences. That opinion is supported by judicial * authority. *Morton v. Fenn* (c) cannot be relied on for the expression of Lord MANSFIELD's opinion; for it is admitted on the other side that the report is erroneous as to the application of the rule of *turpis contractus*.

[LORD CAMPBELL. — If a man was to say to a woman, I will marry you in six weeks if you will sleep with me to-

(a) 1 Siderf. 13.

(b) 1 Co. Lit. 33 a, n. 10; see *ante*, p. 597.

(c) 3 Doug. (Roscoe's ed.) 211.

night; that would not be a marriage by the law of Scotland.

LORD BROUGHAM.—I never heard that such a promise could have effect in Scotland as a marriage. A marriage is constituted *per verba de futuro*, followed by a *copula*; for that, as it is said, by relation backwards purifies the condition; but not, as in the case supposed, where the *copula* is the condition of the promise.]

If so, then the case of *Morton v. Fenn* may be wholly dismissed from consideration here; for the contract which Lord MANSFIELD is supposed to have said would be a marriage is now stated by your Lordships to have no such effect, even in the law of Scotland. The report of Lord MANSFIELD's observations must therefore be taken to be wholly erroneous.

Perkins (a) shows, in the fullest manner, the difference between a marriage and a contract which does not constitute a marriage: "If a woman take a husband, and, leaving the same husband, she marrieth another husband who is seised of land in fee, and the second husband die, she shall not have dower of his land *causa patet*. But if A. make a contract of marriage with C. D., and before the marriage solemnized between them she marrieth with J. K., who is seised of land in fee, &c., and J. K. die, she shall have dower as wife of J. K. if the marriage be not avoided, * for it was * 627 but voidable. And if a man seised of land in fee make a contract of matrimony with J. S., and he die before the marriage solemnized between them, she shall not have dower, for she never was his wife." Then comes the passage already referred to on the other side, about the marriage in a chamber, and the statement that "the law is contrary at this day." No doubt the law had been altered, but only to a certain extent: the necessity of the marriage in the church had been dispensed with, but the presence of a priest remained, as it always had been, necessary. And in another passage in Perkins (b) it is said, "And if a contract of mar-

(a) Tit. Dower, 305, and two following sects., p. 135.

(b) Tit. Feoffment, p. 87, §§ 194, 195.

riage be between a man and a woman, yet one of them may enfeoff the other, for yet they are not one person in law, insomuch as, if the woman die before the marriage solemnized between them, the man unto whom she was contracted shall not have the goods of the wife as her husband, but the wife thereof may make a will without the agreement of him unto whom she was contracted." That shows that till the solemnization they are not man and wife. "But after the marriage celebrated between a man and a woman the man cannot enfeoff his wife, for then they are as one person in law." This is decisive. Thus we have the concurrent declaration of the common and ecclesiastical lawyers that the contract did not make the marriage, but left the man free; and by leaving him free, enabled him to make that disposition of his property to the woman which it is clear he could not make if in law she had been his wife. The law, as laid down by Lord COKE, shows the difference between the wife *de facto* and the wife *de jure*. He says, (a) "If a marriage *de facto* be * 628 * voidable by divorce, in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have been dissolved and the parties freed *a vinculo matrimonii*, yet if the husband die before any divorce, then, for that it cannot now be avoided, this wife *de facto* shall be endowed, for this is *legitimum matrimonium* (as in the other cases where the wife is *infra annos nubiles*) *quoad dotem*. . . . But if they were divorced *a vinculo matrimonii* in the life of her husband, she loseth her dower: otherwise it is if they were divorced *causa adulterii*." Here is a clear distinction taken between the wife *de facto* and *de jure*; and the distinction is still further enforced by the fact stated in the same place, that "a wife *de facto* shall not have an appeal of the death of her husband, but only a wife *de jure*." In what arose this distinction but in the performance or absence of a religious ceremony? Lord COKE's authority, therefore, may be cited to show that in his opinion the contract did not make the marriage. And Rolle's Abridgment, (b) and the

(a) 1 Co. Lit. 33 a, b. 34.

(b) Tit. Bar. & Fem. A., pp. 340, 341.

Epitome of Sheppard, (a) who wrote in the time of the Commonwealth, are to the same effect. In Sheppard it is expressly said, "They were by the laws formerly to be married by a minister before witnesses, according to the substance of the Common-prayer. But now by the new Act the law is altered herein, and marriages are to be made up by the justices of the peace, and not by the ministers." The Epitome was dedicated to Oliver Cromwell, and this declaration of the old law is therefore very important. In *Haydon v. Gould*, (b) the right of the husband to the administration of the wife's estate came into question. It was not a question of *contempt of the Ecclesiastical Court, * 629 but of the right of the man who claimed to be husband, and that of the heirs. The man was held not to be the husband, because no priest had been present at the marriage, and the heirs had the administration.

[LORD CAMPBELL. — Was it held in *Haydon v. Gould* that the marriage was void for all purposes?]

It was not quite said so.

[LORD CAMPBELL. — But was it not said that though, as to the man, the marriage gave him no rights as to the administration, still that the children were legitimate?]

It is said so.

[LORD CAMPBELL. — The legitimacy of the children is the test of marriage. They could not be legitimate if they were not born in wedlock; and the refusal of the right to the man may be accounted for on the ground of the Ecclesiastical Court refusing its assistance to a man who had disregarded the ecclesiastical law.]

The assertion that the children were legitimate appears, however, to have been made by the counsel, not by the Court. But assuming it to be otherwise, that is not a dis-

(a) Tit. Mar., c. 109, p. 720.

(b) 1 Salk. 119.

tinct decision. Swinburne on that point says: (a) "Other effects there be of spousals, whereof some respect the issue or children begotten before celebration of the marriage between those who have contracted spousals. Concerning their issue, true it is that by the canon law the same is lawful, but by the law of this realm their issue is not lawful, though the father and mother should afterwards celebrate marriage in the face of the church." He then refers to the law of the ancient world, as shown in the case of Jacob and his handmaids, and proceeds thus: "But it is otherwise by the laws

of this realm; for as the issue is not legitimated by
 * 630 the subsequent marriage, no more can he *inherit his father's land; and as he cannot inherit, no more is she to have any dower of the same land. For whereas by the laws of this realm a married wife is to have the third part of her husband's lands holden in fee-simple or fee-tail, either general or special, for her dower, after her husband's death, during her life; yet a woman having contracted matrimony, if the man to whom she was betrothed die before the celebration of the marriage, she cannot have any dower of his lands, because as yet she is not his lawful wife. Indeed it was sometimes held for law within this realm of England, that if a man affianced to a woman did carnally know her, and then make a feoffment to the same woman of a piece of land and give her seisin thereof, and after that marry her in the face of the church, the feoffment was void as being made unto his own wife, to whom he had given his faith and whom he had carnally known, he and she being one person in law. Which thing is also agreeable to the civil law and to the canon law also, whereby the donations which are forbidden between the husband and wife are interpreted likewise to be forbidden between them who have contracted espousals *de præsenti*, or who, having contracted espousals *de futuro*, do afterwards lie together, whereby these espousals are reputed matrimony. But afterwards the temporal lawyers of this realm were of another opinion than they were in former times: and whereas long ago they did seem to hold that the feoffment was not

(a) Page 233, § 17, par. 28.

good as being made to his own wife, now they do hold that it is good as being made not unto his own wife, but unto a single woman, and another person in law. But a single woman cannot have any dower as aforesaid, and therefore a woman contracted only to a man cannot have any dower of his lands." *Such is Swinburne's state- *681 ment. If he is to be taken as an authority, — and he has been appealed to as such on the other side, — his statement is decisive of the question. Here is no general vague and doubtful expression of opinion or statement of facts. The old law is stated, and the changed opinions of the lawyers, the "temporal lawyers," of Swinburne's time. The circumstances, and the doctrine upon them, are both set forth with the utmost particularity; and there can be no doubt that if at first the lawyers of England yielded to the foreign priests on this point, they soon emancipated themselves from this foreign authority, and asserted that of the English law, which they thus rendered consistent in all its parts. So that all the authorities show that though the contract, as between the parties themselves, binds them to this extent that they cannot resile from it, yet it gives no rights to the parties till the contract has been solemnized with religious ceremonies. Comyn (*a*) and Bacon (*b*) have adopted these ancient authorities, and there is nothing in the law of this country which has rendered these authorities unavailable. A contract of this kind cannot be considered a marriage; when it will not prevent a man from disposing of his property, it will not entitle the woman to dower, nor to the administration of his estate. A decree for enforcing such a contract does not say that that is a good marriage, and that the other is a bad marriage, but that the contract is a good contract, and that it shall be completed by such a ceremony as will alone give effect to it as a marriage.

Turning from this view of the subject, it is proper to see what has been the practice in this country regarding marriages: and here the matter of the Fleet *mar- *682 riages requires consideration. If marriages *per verba*

(a) Dig. tit. Bar. & Fem.

(b) Abr. tit. Marriage-Dower.

de præsenti could have been had in England without any religious ceremony, why should there have been the Fleet marriages and the Scotch elopements?

[LORD CAMPBELL.— There were Fleet marriages, but not Scotch elopements, before the English Marriage Act.]

But there have always been Scotch elopements. And with regard to Fleet marriages, all the facts proved upon the public inquiry, and even all the works of fiction and the plays which represented such events, described a person officiating as a parson and falsely assuming that character, as a necessary personage to every marriage there celebrated. All this would have been unnecessary had it not been the universally recognized law that the presence of a priest was necessary to the celebration of the marriage. It is impossible to explain away this fact. The Statute of Geo. 2 did no more than the canons, which have been referred to, did. They assumed the presence of a priest, but required that he should be a duly authorized priest who should perform the ceremony in a particular form, with particular observances preceding the ceremony. The evils to be remedied were those which were compatible with the existence of the priest and his presence at the ceremony, and the remedy itself assumed his existence, but put his interference under certain regulations which should prevent the simulation of the priest's authority; and it added the pain of nullity as a punishment for disobedience.

Where was the necessity for those statutes which were passed to prevent the celebration of marriages by Romanist priests, if the parties, without any ceremony or any priests, could contract marriage in a valid form? Then what

* 633 has the legislature done since the * case of *Dalrymple v. Dalrymple*? The statutes passed since that case have been passed to remove doubts as to whether the colonists carried with them all the laws of England, or only such as were suited to the condition of the colony. That is the explanation to be given of the Newfoundland cases; and if the law in England had left the question of marriage in Eng-

land as loose as the argument on the other side supposes, could it have been doubtful whether such a law could have been applied to the condition of Newfoundland? Then as to the Indian marriages. It is clear that these marriages had been good and valid, and even regular, according to the law of Scotland, but they were not regular according to the law of England; and as the people who went to India carried with them the law of England, it was necessary to make marriages contracted in India, but contracted according to the customs of the law of Scotland, good and valid by the law of England. The law was not a declaratory law, it was an enacting law; it said that those marriages shall be, and shall be adjudged to be, good. This Act would certainly have been wholly unnecessary, had the law in England been such as the other side maintains. *Dalrymple v. Dalrymple* was not recognized in 1817, as affecting marriages under the English law: the regulations made with regard to marriages in our colonies prove this to be the fact. In Burge's Treatise on Foreign and Colonial Law, (a) it will be found that regulations have been specifically established in all the colonies, and precisely on the ground that the law of England was not such as the case of *Dalrymple v. Dalrymple* supposes it to have been.

Now what is the state of the case as to the marriages * of Jews and Quakers? It is said on the other side * 634 that the contract, the consent itself, makes the marriage; but in *Lindo v. Belisario* (b) the consent was as plainly given as it could be; but a part of the Jewish law was left unobserved in that case, and the contract was therefore held to be bad. That case is a strong authority to show that more than mere consent between the parties — namely, the proper performance of a religious ceremony — is necessary to constitute a marriage valid by the law of England. Then take the case of the Quakers. Their marriages have been repeatedly acknowledged; but so far is it from being clear that their marriages were always good, that they were, with

(a) Vol. 1, pp. 144–156, *et seq.*

(b) 1 Hagg. Cons. Rep. 216, and App. 7.

the Jews, excepted from the first Marriage Act, and in 1835 it was thought necessary to protect them by a distinct legislative declaration; but even then the provisions of the statute were confined to the case of two parties, both of them being Quakers. So careful was the legislature to guard against extending a particular privilege in derogation of the general law.

The principles which explain the cases on the other side are, therefore, easily to be understood. In the first place, the cases relied on by the other side are those in which the validity of the marriage did not come directly in question. Some are cases of actions for trespass on land in the possession of the wife, but in all of them the possession was sufficiently proved to establish the right of the party against a wrong-doer. Another class of cases is of this sort: the religious ceremony was held to be necessary, but two other principles were introduced: the first of which was that the supposed marriage took place in a chapel, by which it appeared to have been performed by a person in
 * 635 * holy orders; the marriage, therefore, was not invalidated. *Hawke v. Corri*, (a) decided by Lord STOWELL, is a case of this sort. Another principle was, that if the party went to a minister of another sect, and represented himself as belonging to that sect, and his representation was believed by the woman becoming his wife to be so, a marriage contracted under such circumstances was held to be good, for the proceeding would otherwise be a fraud. *Swift v. Swift* (b) is a case of this sort. There is nothing which does not fall within, or cannot be clearly explained by, the principle above stated, except the case of *Collins v. Jesson* (c) and *Wigmore's Case*, (d) and these were cases of prohibition. The doctrine stated in these cases was extrajudicial; it was not required for any purpose of either of them. In addition to which, it may be observed that the doctrine supposed to be laid down in *Collins v. Jesson* is differently stated in the two reports; and it is, besides, inconsistent with what had up to that time

(a) 2 Hagg. Cons. R. 280.

(b) 3 Knapp, 257, 803.

(c) 6 Mod. 155; 2 Salk. 437.

(d) 2 Salk. 438.

been considered to be the law. The only remaining case is that of *Dalrymple v. Dalrymple*, (a) and the first observation on that case is that it does not apply to the point, for the point there was the validity of a Scotch marriage; nor was the *dictum* used material to the case. The question was solely one of a Scotch marriage, — whether the canon law had been received in Scotland, what the canon law was, and how its rules affected the particular circumstances of that case. Not one of the authorities on which this case must be decided could have any bearing whatever upon that. Both sides here agree as to what is the canon law; but the question is whether that * law has been introduced into England. * 636 On the part of the defendant in error, it is denied that the canon law was ever received as the settled law of England.

On the question of a Presbyterian minister being sufficient to celebrate a marriage, little need now be said; that question seems to lie in a very small compass. The House has now to consider what is the meaning, in the English law, of “*Presbyterum sacris ordinibus constitutum*.” Where is that term to be construed? In the English Courts, in the Bishops’ Courts. But to decide it in the sense now sought to be given to it, the House must call on the bishop to decide that *sacris ordinibus constitutum*, in the sense in which it is explained by the laws of his church, does not necessarily mean episcopal ordination. The bishop cannot do so; the Act of Uniformity has settled that point. The establishment of Presbyterian discipline in Scotland cannot affect the sense of the term when the question of its sufficiency is to be decided in England, and by an English bishop, acting under the authority and administering the provisions of the English law.

Mr. Kindersley, on the same side. — The case, as now to be considered, appears in the form of two questions: first, whether a contract *per verba de præsenti* constitutes a marriage; secondly, whether, as between two persons not of the

(a) 2 Hagg. Cons. Rep. 54.

Presbyterian church, a Presbyterian minister is so far in holy orders as to give, by his presence and celebration of a marriage, validity to the ceremony. The other side has proceeded altogether on the assumption that the canon law is the basis of the marriage law of England. This is a mistake. The civil and the canon law existed together in the other countries of Europe, and in Scotland itself; but in England

* 637 a Saxon law, both civil and ecclesiastical, * existed.

The House is perfectly well aware how the Saxons, after the Conquest, resisted every attempt to introduce the foreign laws into this country. HALE, in his History of the Common Law, describes the common law as divided into two portions, — that which existed before the Conquest and that which sprung up afterwards; (a) and he expressly describes the canon and civil laws as wholly dependent, for any part of their authority, on the permissive recognition of them by the common law of England. It is said to be a principle of the civil law, that marriage was merely a civil contract. But that was not so in ancient Rome itself; the *confarreatio* was a religious ceremony. The later periods of Rome saw the *confarreatio* abandoned, and the *coemptio* and *usus* introduced; but that was done merely for the purpose of giving the parties greater facility of divorce. The civil law, therefore, must be assumed to have required a religious ceremony in the first instance; but whether it did so or not is immaterial, for that law was never received in this country. The law which refused to admit the legitimacy of the *antenati* had its basis, not in the civil nor in the canon law, but in the ancient English Saxon law; and when the bishops *instanted*, as it was said, the rule of allowing the *antenati* to become legitimated by a subsequent marriage, because the church *habet pro legitimis*, it was refused as contrary to the old Saxon law of England. If it can be shown that there was an ancient Saxon law on this subject, the common law of England must be admitted to be as the defendant in error now contends. In the ancient laws of England, from the seventh to the tenth century, published by the record commissioners, there appears this law.

(a) Pages 4, 24, 29.

[LORD CAMPBELL. — Has not * the authenticity of * 638 many of these laws been doubted?]

Every thing ancient is doubted; but these are records preserved for centuries as the records of the country. These may be considered as the Anglo-Saxon laws; Wilkins so considered them. In this publication (a) is a law on this subject. It should be observed that these laws purported to be passed in 940 at a great assembly of the laity and clergy at London, "*utriusque ecclesiastici ordinis et politici.*" There are various laws on ecclesiastical and on criminal laws, and then "as to the betrothing of a woman;" and there is this rule, "At the marriage there shall be a mass-priest, by law, who shall, with God's blessing, bind their union to all prosperity." The expression "*adunare*," in the old law-writers, seems to mean to tie the knot: and the equivalent of this expression is used in this old law, which the commissioners have given in the Saxon words and character. Palmer, in the *Origines Liturgicæ*, (b) shows that the form and expressions of our present ritual are the same now as they have been for upwards of 1,000 years.

[LORD CAMPBELL. — Does the form differ materially from the form in Roman Catholic countries?]

I do not know. Even after the Conquest, the Italian laws, as they are called, were forbidden to be introduced; Blackstone. (c) Then, as the law just quoted existed in the reign of Edmund, there is shown an origin of an English ritual, requiring the presence of a priest. Then where is there any proof of an alteration in that? The decretals of Gregory IX. were published in 1230; in 1235 the barons refused to introduce the law from them. The earliest case is that which is mentioned in the first Institute. (d) * If that * 639 was law at that time, it is clear that a contract *per verba de præsenti* was not marriage; nor such a contract with

(a) 108, 109; tit. Laws of King Edmund.

(b) Chap. 7, p. 208.

(c) 1 Comm. 15, 82-84; 4 Comm. 422.

(d) Co. Lit. 33 a.

a *copula*; nor such contract and *copula*, with issue born: nothing can be more decisive. In a short time afterwards *Foxcroft's Case* (a) occurred, and is mentioned by Rolle as law, without any note of dissent on his part. If that is law, it is impossible to conceive that any thing can be more direct or conclusive. That case shows decisively that a religious ceremony was required; and though not perhaps showing what the law was in later times, it is good to show what it then was; and on that point the defendant in error says the law never has been altered. Then comes *Del Heith's Case*. (b) The ceremony there was performed with a mass-priest, but not in the church, and the marriage was therefore held bad.

[LORD COTTENHAM. — Can you refer to the law which absolutely required a marriage in the face of the church? Because otherwise those cases are not consistent with what you say was the ancient Saxon law.]

It was at the 4th Council of Lateran, under Pope Innocent III.; and these cases occurred shortly after that time. The Saxon laws existed before the canon law was known as a *corpus juris*. There is a difference between the canon law and the law of England, on the subject of divorce. Except by an Act of Parliament, no divorce *a vinculo matrimonii* is known to the law of England. In that respect the most important difference exists between these two systems of marriage law. In the continental States the ecclesiastical authorities pronounce such a divorce.

[LORD CAMPBELL. — That was the rule in all countries where Christianity prevailed.]

In Scotland the civil tribunals pronounce such a divorce.

[LORD CAMPBELL. — Yes, but the Court of Session therein represents the commissary, who represented the bishop.]

(a) 1 Roll. Abr. 359; Rogers's Ecc. Law, 584.

(b) Harl. MSS. 2117; Rogers's Ecc. Law. 584.

[LORD BROUGHAM. — And the bishop represented, in former times, the pope ; it is a popish relic.]

THE LORD CHANCELLOR. — The principle is that the intervention of the supreme power of the State is necessary ; the mode of exercising that power is the only difference.]

The Saxon canon law existed here from a very early period. In 1076 there is a canon of Lanfranc (*a*) expressly on this subject, commanding that “ no man give his daughter or kinswoman in marriage without the priest’s benediction. Other marriages shall be deemed fornication.”

[LORD COTTENHAM. — But how do you reconcile that canon with the Saxon law of 940, which you have already quoted ? That canon seems to me to lay down a rule for the first time.]

The civil law was part of the law of pagan Rome, and the canon law followed it in many respects. The argument on the other side is that marriage is merely a civil contract. But what says Lord STOWELL in *Dalrymple v. Dalrymple* ? (*b*) “ A religious ceremony was superadded ; ” and in *Lindo v. Belisario* (*c*) he says : “ Opinions have divided the world as to the nature of the contract. It is held by some persons that marriage is a contract merely civil, by others that it is a sacred, religious, and spiritual contract ; ” and he himself thinks it a civil contract, with a religious ceremony superadded. So that there is even his authority for saying that marriage is partly a civil and partly a religious contract, and he nowhere says that it is perfect without * both. * 641 Then again it seems to be decisive of the matter, that after the separation of the bishop and the earl in the county Court, the question of marriage was sent to the Court of the bishop. If marriage was not a religious contract, why send it there ? They might as well have sent thither questions of partnership. Another matter shows by analogy the differ-

(*a*) 2 Johnst. Ecc. Law, A.D. 1076, § 5.

(*b*) 2 Hagg. Cons. Rep. 63.

(*c*) 1 Hagg. Cons. Rep. 230.

ence of the question occasioning a distinction in the tribunals. Originally there were two sorts of bastardy,—general and special. The bishop decided one.

[LORD COTTENHAM. — No canon was ever by its own force a part of the law of this country. When, therefore, there was a separation between the civil and ecclesiastical tribunals, the latter must have decided the question sent before them according to the law as they found it.]

Of course they must: and as they found the ancient Saxon ecclesiastical law established, they would act on that. What was the origin of the distinction among the different sorts of dower? What but this, that a religious ceremony was necessary. And did not the customs of the people show that? What but that occasioned the Fleet marriages and the marriages at May Fair? and what made the writers of plays and novels always describe marriages as taking place before a priest, if a mere contract *per verba de præsenti* was sufficient to constitute marriage?

[LORD CAMPBELL. — But that authority is worth nothing in any way; for these writers always represent that a marriage in the presence of a *pseudo* priest is bad, whereas that is confessedly good.]

But their writings show what was the popular estimation of the matter. The foreign jurists and canonists are of no authority in this case; the *Pupilla Oculi* and the *Manipulus Curatorum*, therefore, are of no worth as authorities.

* 642 But if canonists are to be * cited, there is one whose work, called “The Law’s Resolution of Woman’s Rights,” is cited with approbation by the Vice-Chancellor of England in *Beere v. Ward*. In that work it is said, “If a woman and a man marry, they are not *una persona* in the eye of the law before a marriage had between them in the church.” If that was so, how is it possible to say that a contract *per verba de præsenti* is and always has been *ipsum matrimonium*, when, from the earliest times up to the period

of *Dalrymple v. Dalrymple*, not one single case is to be found in which there is a decision (not a *dictum* but a decision) that such a contract amounted to a valid marriage? The case mentioned by Hale, *Foxcroft's Case*, and *Del Heith's Case*, are authorities the other way.

[LORD CAMPBELL. — Do you rely on *Del Heith's Case*? for that requires a marriage *in facie ecclesiæ*.]

Yes, that was the case then ; it was not law in the Saxon time, but it had sprung up since. Then comes *Bunting v. Lepingwell*, (a) which has already been disposed of. *Payne's Case* (b) occurred in 1660 ; there counsel asserted that the contract was a marriage, but Justice TWISDEN said that religious solemnization was necessary ; and in *Tarry v. Browne* (c) he says the same thing. Then comes another case not long afterwards, *Holder v. Dickeson*, (d) where VAUGHAN, Chief Justice, held that the woman must allege that she had tendered herself before a priest. In *Weld v. Chamberlain*, (e) Chief Justice PEMBERTON inclined to think it a good marriage, as the woman had repeated the words after a priest. In *Hutchinson v. Brookebanke*, (g) the parties had married in their own dissenting chapel, and there the legality of the marriage was disputed. *Haydon * v. Gould* (h) * 648 was the case of the marriage of Sabbatarians, and the Ecclesiastical Court actually recalled the letters of administration ; and that was not done on the ground of contempt, but because the marriage, being before a layman, was void. And, indeed, a refusal of letters of administration never could be made on such a ground. But there the case was stronger than a mere refusal of letters of administration would have been ; for the man had got the letters, and they were recalled because he was not her husband. Then come the cases of *Jesson v. Collins* (i) and *Wigmore's Case*, (k) where Lord

(a) 4 Rep. 29; Moor, 169.

(c) 1 Siderf. 64.

(e) 2 Show. 1200.

(h) 1 Salk. 119.

(k) 2 Salk. 438.

(b) 1 Siderf. 13.

(d) Freem. 95.

(g) 3 Lev. 376.

(i) 2 Salk. 437.

HOLT says that the words were by the canon law *ipsum matrimonium*. The question in both these cases was one of prohibition, and therefore he naturally referred to the canon law; would he have confined himself to the canon law, if this had been in his opinion the common law of England? At all events, the opinion was extrajudicial. The next is *Fielding's Case*, (a) and there the marriage was a contract celebrated by a priest in holy orders. The next case is *Lord Fitzmaurice's Case*, (b) where there was a contract *de præsenti*, and the lady libelled Lord Fitzmaurice to have the marriage, contracted in this manner, declared a good and perfect marriage. The Court did not make such a decree, but the decree was *quod subiret matrimonium*. Now in the cases of the Fleet marriages, where a priest was present, that never was the sentence; for though clandestine, there had been a religious ceremony.

[Dr. Haggard, at the desire of the House, here made a statement relative to some matters as to which inquiry had been directed (see *ante*, p. 556): that the parties in the Fleet marriages subjected themselves to the censure of the church, but that the marriages were deemed sufficient. *Babington v. Babington* was a suit for nullity of marriage. The second wife gave in her libel, in which she stated that Babington, a soldier, paid his addresses to her; that she gave her consent and banns were published, and they were married "according to the rites and ceremonies of the kirk of Scotland."

Lord BROUGHAM asked whether the Scotch law ought not to have been differently pleaded.

The Queen's Advocate said that the pleading of the Scotch law in *Babington v. Babington* was not in form sufficient. It might have been demurred to, but not having been demurred to, it must be taken to have been treated there as sufficiently alleged.]

(a) 14 Howell's State Tr., 8vo. ed. 1327.

(b) 1 Lee by Phill. 28, n.

Mr. Kindersley continued. — The sentence there was that true, pure, and lawful matrimony had been contracted between them. And wherever there has been the performance of a religious ceremony before a priest, the Courts never make the decree *quod subiret matrimonium*. Then comes *The King v. Luffington*, (a) and there an order of removal was quashed for want of an allegation that the person who celebrated the marriage was a priest in holy orders. There was clearly a contract, in that case, *per verba de præsenti*. Lord Chief Justice LEE said, “The sessions should have determined whether the marriage was by a clergyman in holy orders or not.” If the presence of a man pretending to be a clergyman had been alone sufficient, the order would not have been quashed for want of the other allegation. The next case, that of *Scrimshire v. Scrimshire*, (b) is not of any applicability here. The next is *Woolston v. Scott*; (c) that was an action of crim. con.; and there, as it was an *action against a wrong-doer, and not a claim of right, * 645 Mr. Justice DENISON held that the proof of marriage by a contract *per verba de præsenti* was sufficient. *Lindo v. Belisario* (d) does not apply to the case. In *Reed v. Passer*, (e) Lord KENYON merely said, “I think, though I do not mean to be bound, that a present contract is a marriage.” This surely cannot be any authority. *The King v. Brampton* (g) is cited on the other side, for a *dictum* of Lord ELLENBOROUGH. The answer to that case is, first, that that *dictum* was not at all necessary for the decision of the case: and, in the next place, Mr. Justice BAYLEY says, that on the facts as there stated he could not say that a priest in holy orders was not present. The very next case is *Dalrymple v. Dalrymple*. (h) That is the main, if not the only, case in favour of the other side. But that was a question of Scotch marriage in Scotland by Scotch persons. Sir W. SCOTT set out with saying, (i) “Being entertained in an English Court, it

(a) 2 Burr. Sett. Cas. 322; 1 Wils. 74.

(b) 2 Hagg. Cons. R. 395.

(c) Bull. N. P. 28.

(d) 1 Hagg. Cons. R. 216.

(e) Peake, N. P. 232.

(g) 10 East, 282.

(h) 2 Hagg. Cons. R. 54.

(i) 2 Hagg. Cons. R. 58.

must be adjudicated according to the principles of English law applicable to such a case. But the only rule applicable to such a case is, that the rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." Then completely *obiter*, without, according to his own statement, its having any thing to do with the case, he pronounces the sentence which has been relied on. But even he says that the common law had scruples in applying the rights of legiti-

macy, community of goods, and dower, to this looser
* 646 sort of marriages. * Now, allowing every thing proper

to the authority of Sir W. Scott, the question is whether this House will give the effect of direct authority, as to what is the common law of England, to the *obiter dicta* of an Ecclesiastical Judge who had himself previously declared that, after furnishing the principle of proceeding, the English law withdrew altogether from the contest. *Latour v. Teasdale* (a) is objectionable, because, without examination, it assumed the correctness and authority of *Dalrymple v. Dalrymple*, and decided according to it. But with the exception of this case, which goes too far, no other has adopted that decision. The case of *Smith v. Maxwell* does not adopt it. (b) There the action was on a bill of exchange, and coverture was pleaded; and Chief Justice BEST says that he is aware of "no law which says that celebration in a church is essential to the validity of a marriage in Ireland." But there the religious ceremony had been performed, and performed by a clergyman of the Church of England, and the only doubt was as to the place where the ceremony had been performed. In *The King v. The Inhabitants of Bathwick*, (c) the persons were married by a Protestant priest in Ireland, with a religious ceremony; and, without any declaration that a contract *per verba de præsenti* was sufficient to constitute a marriage, the case was decided on the ground that the evidence of a mar-

(a) 3 Taunt. 830; 2 Marsh, 233.

(b) 1 Ryan & Moo. N. P. 80.

(c) 2 B. & Ad. 639.

riage was sufficient. There was a case at Nisi Prius in Ireland, *Verner's Lessee v. Robertson*, cited in the Court below, (a) and there Mr. Justice FOSTER distinctly stated that he did not agree with the authority of *Dalrymple v. Dalrymple*.

These are the cases, and there is not one among them deciding in terms that a contract *per verba de præ-senti* * is a marriage. Most of the cases were decided * 647 on points that would have been wholly immaterial had that been the law. There are cases opposed to the supposition that such is the law. The whole, then, depends on the *dictum* in *Dalrymple v. Dalrymple*; and that *dictum* was there uttered with respect to a matter not properly under the consideration of the Court. Turning, then, from the cases to the text-writers, what is the result? If the House finds that a writer of authority, declaring the canon law, says that it is not the law of the country, it must be held decisive. Now, several writers of great authority may be cited for that purpose. Swinburne (b) has been already cited, (c) and Godolphin (d) agrees with him. Comyn says, (e) "If a man marry with a woman precontracted, they are husband and wife till divorced," which could not be if the contract was a marriage; and Coke, (g) "If a man marry with a woman precontracted, and has issue by her, this issue in law and truth bears the surname of the father. But if, after, husband and wife be divorced for the precontract, now the issue has lost his surname and is bastard." That is, after the second marriage is set aside, the issue is bastard, but till then he is lawful. In Blackstone, (h) after speaking of disabilities affecting marriage, and mentioning precontract among them, it is said, "But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is made during the life of the parties; for after the death of either of them, the Courts of Common Law will not

(a) Dix's Rep. 39-143.

(b) Espousals, 223.

(d) Repertorium, tit. Bastardy.

(g) 6 Rep. 66, 67.

(c) *Ante*, p. 629.

(e) Bar. & Feme, B. 6.

(h) Comm. vol. i. p. 434.

* 648 suffer the spiritual Court to *declare such marriages to have been void." Therefore the issue of such second marriage, until it is avoided, is lawful. How can that be if the first marriage is good? Another consequence is, that neither party can enfeoff the other after marriage, though each can after contract. Again, a woman after contract may make her will, but not after marriage: and the same is the case with regard to dower.

Now take some of the consequences in the Ecclesiastical Courts themselves. *Haydon v. Gould* (a) is decisive that a mere contract of this sort does not entitle the husband to administration: and as to the wife's goods, Swinburne (b) declares espousals *de præsenti*, or *de futuro cum copula*, will not entitle the husband to the wife's goods; nor can the wife ask for administration to her husband. In *Lemon v. Lemon*, (c) in the Consistory Court of Armagh, Dr. MILLER has recently held that he cannot agree with Lord STOWELL's doctrine, and he refused a woman administration in the case of a contract *de præsenti* with a *copula* following. Another consequence of lawful marriage is the suit to compel restitution of conjugal rights: with regard to that, *Green v. Green* (d) is in point. A suit of that sort instituted by a Quaker was dismissed, because a Quaker's marriage was held bad: this was before the statutory recognition of Quakers' marriages. By the law of this country a wife cannot sue a husband for damages; they are *una persona* in law. But in Ireland it is now very common for a woman to sue a man on a promise of marriage. That would be impossible if the promise itself made her his wife. Nor can she be a witness against the husband: yet in an action of seduction

* 649 brought in that country by the father, the *first witness is the woman, who, if the doctrine on the other side, of a marriage being constituted by a contract *de futuro cum copula*, is true, is the man's wife, and is not admissible as a witness. There can be no way of getting out of this difficulty but by saying that they are not man and wife. To

(a) 1 Salk. 119.

(b) Page 284.

(c) 1 Crauf. & Dix Cir. C. 498.

(d) 1 Hagg. App. p. 9.

hold the other doctrine will be to allow a man two lawful wives at the same time and two lawful heirs until by a process of law a decision is made between them, giving a preference to one at the expense of the other.

Then, what is the argument to be deduced from the ordinances and the statutes? The ordinances in the time of the Commonwealth required the parties to go before a justice of the peace. Two statutes of Charles 2 repealed them. The 12 C. 2, c. 33, for England, and 17 & 18 C. 2, c. 8, for Ireland, were these statutes. Both recited that by certain ordinances persons had been compelled to marry in a way not according to the ancient mode. How came such a declaration to be made, if a contract *per verba de præsenti* was sufficient? The presence of a justice of the peace could not have made such a contract of less value than it would have been if made in the presence of any other person. In the same spirit, the Statutes 9 & 19 Geo. 2 treat marriages before a Roman Catholic priest as mere contracts, and not as perfect marriages. Then what is the Marriage Act of England? It recites that evils had arisen from clandestine marriages. These were marriages without banns, but not marriages without a priest. The eighth section having mentioned that many persons do solemnize matrimony in prisons without banns or license, directs that none such shall be solemnized in future; and that if any such shall be solemnized without banns and in a prison, such marriage shall be null. One of these two consequences * must follow: Either the evil was left * 650 without a remedy, if a marriage was good by words alone without any religious ceremony, for the Act takes no notice of such a contract; or it is clear that even before the Act a marriage was good for nothing, without solemnization by some religious rite. Then again, in the forms of that Act, the words are, the clergyman who marries and the parties married; but the Act says nothing of the parties marrying each other, but of having marriage solemnized between them. This difference of expression is very important. Then, returning to Ireland, the 25 Geo. 3 makes the marriages between two Protestant dissenters by their own ministers good. That

Act would not have been necessary to be passed had a mere contract by present words been sufficient to constitute a marriage. And again, it should be observed that that Act relates only to the marriages between two persons of one sect; which was not, or at least is not shown to have been, the case here.

Then as to the point whether, supposing a minister to be necessary, a Presbyterian minister is sufficient: It must be admitted that the citation of ecclesiastical writers on holy orders has nothing to do with the question. The common law must decide what for this purpose are holy orders. Take the periods before the Reformation, from the Reformation to the Revolution, and from the Revolution to the present time. In the first all holy orders were the same throughout Christendom. To show what the law considered the clergy, the 9 Ed. 2, stat. 1, and the 14 Ed. 3, stat. 4, are in point. They speak of the archbishops, and bishops, and clergy of the realm. Several other statutes use the same expression. Then, after the Reformation, the 24 Henry 8 put an end to appeals

to Rome; it did not alter what was the law of the
* 651 church, but left the same orders, and * in many cases
even the same individuals, in full authority and power.

The Acts at that time speak of the clergy of the realm. The Act of Uniformity, 13 & 14 C. 2, for England, and 17 & 18 C. 2, for Ireland, state what is to be the form of ordination. The Toleration Acts do not alter their position. The Act of Union establishes the two churches in the two kingdoms. Then comes the Act for preventing persons in holy orders from sitting in Parliament, and that of course extends to ministers of both churches in the two countries. In all these Acts, ministers of the Established Church are alone referred to. It is clear, therefore, that clergymen of the Church of England must be, for this purpose, the clergyman whose act alone would make the marriage lawful. Under these circumstances, there can be no doubt as to the conclusion at which the House must arrive. It must decide, first, that a contract *per verba de præsenti* is not a good marriage; and, secondly, that a dissenting clergyman is not a person who is a person capable of solemnizing this marriage.

The Attorney-General, in reply. — The declaratory Acts being so, must be considered to imply that the common law, previously to their being passed, allowed the things to be done which those Acts declared when done to be good.

With respect to the cases; there is no authority in the common-law reports opposed to the argument now submitted to the House on behalf of the plaintiff in error. There is one case, *Latour v. Teasdale*, a common-law case, decided by a full Court, and after time taken to consider, in favour of this argument. The note in Roper's Husband and Wife is a misrepresentation of the case; and that case is decisive.

[THE LORD CHANCELLOR. — I know that Lord Chief Justice * GIBBS did not always write his opinions.] * 652

Then as to *Dalrymple v. Dalrymple*, it was a most deliberate judgment, and exhibited the settled opinion of Lord STOWELL; for in 1795, no less than 16 years before, he had, in *Lindo v. Belisario*, taken exactly the same view of the law; but the law as there laid down was not new. Blackstone in 1753, and Jacob's Law Dictionary in 1729, had stated the law in the same manner. Then the authority referred to by Perkins, (a) to show that a man might enfeoff after contract but before marriage, but could not enfeoff if the marriage had taken place, is altogether erroneously quoted by him; there is not a syllable about a precontract in the case itself.

It is said that in 1230 this country adopted the rule to marry only in the church, but that that was afterwards relaxed. How relaxed? What, relaxed, when the church of Rome was day by day more strictly enforcing its discipline and its authority over the nations of Europe? The answer to the objection respecting the calling of the young woman as a witness, in an action brought by her father for her seduction, is clear enough. She may say that he promised to marry her. Suppose he did; before whom did he make the promise? before nobody. She could not, then, under any system of law be deemed his wife; for the contract of marriage must be

(a) Tit. Feoffments, 194.

made in the presence of witnesses, or authenticated by the writing of the party making the promise. If neither of these circumstances existed, she would be admissible as a witness, not because of any defect in the contract itself, but of defect in the means of proving it. On the second point of the argument, the case may be left as it was at the opening.

* 658 * Questions were then put to the Judges, who required time to consider them.

Opinions of the Judges. LORD CHIEF JUSTICE TINDAL. — My Lords, the first question which your Lordships have proposed to her Majesty's Judges is the following: "A. and B. entered into a present contract of marriage *per verba de præsenti* in Ireland, in the house and in the presence of a placed and regular minister of the congregation of the Protestant dissenters called Presbyterians; A. was a member of the Established Church of England and Ireland; B. was not a Roman Catholic, but was either a member of the Established Church or a Protestant dissenter; a religious ceremony of marriage was performed on the occasion by the said minister between the parties, according to the usual form of the Presbyterian church in Ireland; A. and B., after the said contract and ceremony, cohabited and lived together for two years as man and wife; A. afterwards, and while B. was living, married C. in England: — Did A. by the marriage in England commit the crime of bigamy?"

In order that your Lordships should apprehend clearly the grounds of our answer to this question, we think it will be convenient to consider, in the first instance, separately, the general and abstract question, what were the nature and obligatory force of a contract of marriage *per verba de præsenti*, by the English common law, previous to the passing of the Marriage Act, 26 Geo. 2: and that we should then consider the same question with reference to the particular conditions and circumstances with which it has been submitted for our opinion.

My Lords, the abstract question we propose first
* 654 * to consider is one involved in much obscurity;

and if Serjeant Maynard, the most learned lawyer of his day, was compelled to state, in a debate on the commitment of the Marriage Bill passed by the Parliament in the time of the Commonwealth, (a) “that the law lies very loose as to things that are naturally essential to marriages, as to precontracts and dissolving marriages;” and if Lord Chief Justice HOLT and other eminent Judges have since been found to express themselves with considerable uncertainty upon the same subject; it may well become us, the Judges of England of the present day, when for nearly a century the whole doctrine relating to contracts of marriage, as contradistinguished from marriage itself, has become nearly a dead letter in our Courts, to confess that the subject is involved in still deeper obscurity than in the time of our predecessors, and to acknowledge ourselves unable to trace out and define the boundary between the contract and marriage itself with absolute certainty. Indeed, the learning and ingenuity by the Judges of her Majesty’s Court of Queen’s Bench which have been brought to bear on the subject, as in Ireland, amongst whom a difference of opinion has prevailed, as by the counsel at your Lordships’ bar, upon the argument of this case, is a proof that arguments of great weight, and authorities of which it is impossible to deny the application to the subject-matter of controversy, may be advanced on either side of this disputed proposition.

In this state of the question, it is only after considerable fluctuation and doubt in the minds of some of my brethren that they have acceded to the opinion * which was * 655 formed by the majority of the Judges upon hearing the argument at your Lordships’ bar, and that I am now authorized to offer to your Lordships as our unanimous opinion, that by the law of England, as it existed at the time of the passing of the Marriage Act, a contract of marriage *per verba de presenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the spiritual Court, the power of compelling the solemnization of an actual marriage; but that such con-

(a) See 2d vol. Burton’s Diary, 337.

tract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders.

It will appear, no doubt, upon referring to the different authorities, that at various periods of our history there have been decisions as to the nature and description of the religious solemnities necessary for the completion of a perfect marriage, which cannot be reconciled together; but there will be found no authority to contravene the general position that, at all times, by the common law of England, it was essential to the constitution of a full and complete marriage that there must be some religious solemnity; that both modes of obligation should exist together,—the civil and the religious; that, besides the civil contract, that is, the contract *per verba de præsenti*, which has always remained the same, there has at all times been also a religious ceremony, which has not always remained the same, but has varied from time to time, according to the variation of the laws of the church; with respect to which ceremony it is to be observed, that whatever at any time has been held by the law of the church

to be a sufficient religious ceremony of marriage, the
 * 656 same has at all * times satisfied the common law of England in that respect. If, for example, in early times, as appears to have been the case, from the Saxon laws cited in the course of the argument, the presence of a mass-priest was required by the church; and if, at another time, the celebration in a church, and with previous publication of banns, has been declared necessary by the ecclesiastical law; and lastly, if, since the time of the Reformation, the church held a deacon competent to officiate at a regular marriage ceremony; with each of these modes of solemnization the Courts of Common Law have given themselves no concern, but have altogether acquiesced therein, leaving such matters to the sole jurisdiction of the spiritual Court. So that, where the church has held, as it often has done, down to the time of passing the Marriage Act, that a marriage celebrated by a minister in holy orders, but not in a church, or by such minister in a church, but without publication of banns and without license, to be irregular, and to render the parties

liable to ecclesiastical censures, but sufficient nevertheless to constitute the religious part of the obligation, and that the marriage was valid notwithstanding such irregularity, the law of the land has followed the spiritual Court in that respect, and held such marriage to be valid. But it will not be found (which is the main consideration to be attended to) in any period of our history, either that the Church of England has held the religious celebration sufficient to constitute a valid marriage, unless it was performed in the presence of an ordained minister, or that the common law has held a marriage complete without such celebration.

My Lords, in endeavouring to show the grounds upon which we hold that such is the common law * of * 657 this realm, I shall first consider the decisions which have taken place in our Courts of Common Law ; as to which, it is scarcely necessary to say that decisions of the Courts of Common Law are at once the best expositors and the surest evidence of the common law itself. I shall next advert to certain statutes passed by the legislature at various periods, tending to throw light upon the obscure subject now under discussion, and which appear to confirm the opinion we have formed ; and lastly, shall call attention to the doctrine of the King's ecclesiastical law, as established and administered in this country ; by which alone, and not by the general canon law of Europe, still less by the civil, are the marriages of the Queen's subjects regulated and governed.

And with respect to the decisions of the Courts of Law and the other common-law authorities, if no case can be referred to directly and distinctly laying it down as law, in so many words, that a contract *per verba de præsenti* alone, and without the intervention of a minister in orders, is not sufficient to create a valid and complete marriage, yet such conclusion is necessary from many of the decided cases, and is inconsistent with none : nor, in fact, could the difficulty to be determined in any of the cases ever have existed, except upon the supposition that some religious ceremony was necessary to the contract : thus leading to the conclusion above laid down, that by the law of England the contract *per verba*

de præsenti alone did not constitute a full and complete marriage.

And in referring to these authorities I do not propose to take up each in succession which has been brought in review before your Lordships ; it will be sufficient, to support * 658 the conclusion above stated, to * call attention to those which are the most important, and more especially to those of earlier date, as deserving the greater weight.

The earliest case referred to in the argument is the note from Lord HALE's manuscripts, to be found in Coke, Littleton, 33 a, n. 10. That case is, that A. contracts *per verba de præsenti* with B. and has issue by her, and afterwards marries C. *in facie ecclesiæ* ; B. recovers A. for her husband by sentence of the ordinary ; and for not performing the sentence he is excommunicated, and afterwards enfeoffs D. and then marries B. *in facie ecclesiæ*, and dies. B. brings dower against D., and recovers, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage, "sed reversatur coram Rege et Concilio quia prædictus A. non fuit seisitus, during the espousals between him and B. *Nota* : neither the contract nor the sentence was a marriage."

My Lords, the *Curia Regis et Concilii*, before which the reversal took place, appears, according to the researches of antiquarians, to have been, in the time of Edward 1, a tribunal of appeal in cases of difficulty, and to have consisted at that time of the Chancellor, the Treasurer and Barons of the Exchequer, the Judges of either Bench, and other functionaries ; which Court of the *Concilium Regis* was perfectly distinct from the *Commune Concilium Regni*, the probable original of the English Parliament.

Lord HALE speaks largely of this Court in his treatise on the jurisdiction of the House of Lords ; and various references to and extracts from its proceedings are to be found in the learned Introduction to the *Rotuli Literarum Clausarum*, lately published by the record commissioners. The judgment, therefore, of such a Court of Error is of the * 659 highest * weight. Lord HALE's observation on the case is, "that the sentence was not a marriage ;" in

making which observation he is probably alluding to a question which, about the time he was making his collection of notes, was a matter of contest in Westminster Hall; viz., whether the man and woman were not complete husband and wife by the sentence of the spiritual Court, without any other solemnity: as it appears in *Payne's Case* (a) that Mr. Attorney-General NOY had affirmed such to be the law, whilst TWISDEN, Justice, denied it, saying that the marriage must be solemnized before they were complete husband and wife.

The result, however, of the case above referred to is, that in the judgment of the Court of Error there was no complete marriage until after the actual solemnization of the marriage under the sentence of the Court; and upon the ground that the husband enfeoffed D. before such solemnization, there was no seisin in him during the marriage, and therefore no dower. But the object at present is, to learn from the case whether, in the opinion of the Court, the contract *per verba de præsenti* did alone constitute a marriage; and, both from the judgment of the Court below and of the Court of Error, the conclusion appears inevitable, that each Court thought such contract alone did not constitute marriage: for the case sets out with stating that "A. contracts with B. *per verba de præsenti*;" and if this contract had alone constituted marriage, then was there seisin in the husband during the marriage and before the feoffment to D., and the reason given by each of the Courts for their respective judgments would have * failed. Observe, also, the difference of language * 660 employed in the statement of the facts of the case; the contract *per verba de præsenti*; the subsequent statement that A. married B.; the contract; and the subsequent reason by the Court of Error, that there was no seisin during the espousals. Can the expressions of contract on the one hand, and of marriage and espousals on the other, possibly be considered as synonymous, and referring to the same obligation? And this agrees expressly with HALE's inference from the case, "that the contract is not a marriage."

(a) 1 Siderf. 13; in the year 1660.

Foxcroft's Case, (a) which appears to have been in the same year, is next in order: "R. being infirm, and in his bed, was married to A. by the Bishop of London, privately, in no church or chapel, nor with the celebration of any mass, the said A. being then pregnant by the said R.; and afterwards, within twelve weeks after the marriage, the said A. is delivered of a son, and adjudged a bastard, and so the land escheated to the lord, by the death of R. without heir." Now it is to be observed that this case must have been decided upon the usual plea of bastardy in a real action; the writ must have been sent in the usual form by the Court of Law to the ordinary; the certificate also returned by him in the usual form. Bracton, in book 5, c. 19, gives various instances of the proceedings in cases of bastardy, with the greatest possible minuteness; and amongst others, that in section eleven probably would be the form applicable to this particular case; viz., "an pater suus desponsavit matrem suam;" and it could not have been until after the certificate

of the ordinary, affirming or denying the marriage, that
 * 661 the judgment of the * Court could be given. Let it be conceded that the ordinary certified in this instance the marriage to be void, which, according to the ecclesiastical law, as then in force in England, he ought to have found good, but irregular only, and exposing the parties to ecclesiastical censures; and let it be further conceded that the Court of Common Law acted upon such finding, and gave judgment against the demandant, as indeed it could not do otherwise; still the weight of this authority on the question before us remains the same. Was a contract *per verba de præsenti*, without any thing more, held at that time to be a complete marriage? is the question. If it was, the ordinary must have returned that R. had married A.; for no doubt has been or can be raised, that when the Bishop of London married the two parties, as stated in the case, he married them *per verba de præsenti*. If, therefore, the contract *per verba de præsenti* had by the law of England then made a marriage, the parties were actually married; but if the ordinary finds the marriage

(a) 1 Rolle's Abridg. 359.

bad, even where the ceremony was performed by a bishop, because celebrated at an improper place, the inference appears irresistible that some religious ceremony was necessary, and that words of present contract alone did not at that time, by the law of England, constitute a marriage.

Del Heith's Case, 34 Edward 1, is precisely the same in its leading facts, and in the conclusion at which the Court of Common Law arrives, that a contract *per verba de præsenti*, even before the parish priest, was not sufficient; but the concluding words of the record are too strong to be passed over in silence: "Quæsitum fuit si aliqua sponsalia in facie ecclesiæ inter eos celebrata fuerunt postquam prædictus

* Johannes convaluit de prædicta infirmitate. Dicunt * 662 quod non. Et quia convictum est per assisam istam quod prædictus Johannes Del Heith nunquam desponsavit prædictam Katherinam in facie ecclesiæ per quod sequitur quod prædictus W. filius Johannis nihil juris clamare potest in prædictis tenementis sed in misericordia pro falso clamore."

The conclusion to be drawn from the comparison of two cases to be found in 1st Rolle's Abridgment, p. 360, leads to the same inference, that the contract *per verba de præsenti* was not a complete marriage in the time of Henry 6. The first is at F. *placitum* 1: "A man who hath a wife takes another wife, and hath issue by her; this issue is bastard by both laws (that is, the common law and the ecclesiastical law), for the second marriage is void." On the same page he lays it down, in G. *placitum* 1, a divorce *causâ præcontractus* bastardizes the issue: the same case, in the Year-Book, 18th Hen. 6, p. 84, being cited for both positions. But if the contract alone makes the marriage, if it is itself *ipsum matrimonium*, where is the necessity for a divorce in the second case to bastardize the issue, which it is admitted is not necessary in the former case? They cannot be reconciled together, except upon the supposition that "having a wife" and "taking a wife," that is "actual marriage," was at that time held to be one thing, and "a contract of marriage" another, falling short of the marriage itself. The authority of Perkins, section 306 (whose statements, from his citation of the Year-Books, may be placed conveniently amongst the decisions of the Courts of

Law), is to the same effect: "If a man seised of land in fee make a contract of matrimony with I. S., and he die before the marriage is solemnized between them, she shall not * 663 have * dower, for she never was his wife." Perkins, indeed, goes on to say, in the same section, "and it hath been holden in the time of King Henry 3, that if a woman had been married in a chamber, that she should not have dower by the common law; but the law is contrary at this day." But, whatever is his opinion of the alteration of the law as to the case of the private marriage (by which he probably meant the ecclesiastical law as to the solemnities requisite, which in fact had been altered), still it has no relation to his first position, which is full, complete, and express to the very point now under consideration. His observation amounts to no more than this, that in Henry the 3d's time a marriage was held void which in his day (the reign of Queen Elizabeth) would be held irregular only; and, further, the observation is strong, that Perkins must have meant a different thing by the two phrases, "contract of matrimony" and "marrying in the chamber;" and what other difference can be suggested, except that the one was a contract by words only, the other a contract accompanied by a religious ceremony?

Again, the doctrine laid down by Perkins, title Feoffments, *placitum* 194 (for which he cites the Year-Book, 38 Edw. 3, pl. 12), shows the diversity at that time between a contract and a marriage: "If a contract of marriage be between a man and a woman, yet one of them may enfeof the other, for yet they are not one person in law; inasmuch as if the woman dieth before the marriage solemnized betwixt them, the man unto whom she was contracted shall not have the goods of the wife as her husband, but the wife thereof may make a will without the agreement of him unto whom she was contracted,"

&c.; and at the close of the next *placitum* he says, * 664 "but * after the marriage celebrated between a man and a woman the man cannot enfeof his wife, for then they are as one person in law." Bracton, in book 2, c. 9, entitled "Si vir uxori donationem facere possit constante matrimonio," may be thought to leave the matter in some doubt whether such gifts would be good even after the contract, as he says,

“Matrimonium autem accipi possit sive sit publice contractum vel fides data quod separari non possunt; et re vera donationes inter virum et uxorem constante matrimonio valere non debent.” Now, even if it is considered that by the “*fides data*” Bracton understood a contract *per verba de præsenti*, without any solemnity, it is enough to say he could not be writing as a common lawyer (in fact he was a civilian) when he is found to differ from the authority of the Year-Books.

The case of *Bunting v. Lepingwell* (a) is of great weight, and of immediate bearing upon the point in question. Taking the facts from the two reporters, (b) it appears that Bunting and Agnes Addishall contracted matrimony between them *per verba de præsenti tempore*, and afterwards Agnes took to husband Thomas Twede, and cohabited with him; and afterwards Bunting sued Agnes in the Court of Audience, and proved the contract, and the sentence was pronounced, “Quod prædicta Agnes subiret matrimonium cum præfato Bunting, et insuper pronuntiatum decretum et declaratum fuit dictum matrimonium fore nullum,” &c.; which marriage between Bunting and Agnes took place according to the sentence, and they had issue one Charles Bunting; and whether Charles Bunting was son and heir was the question for the jury in an *action of trespass brought by him; * 665 and the Court held him legitimate, and no bastard.

The argument before the Court turned principally on the invalidity of the sentence of the spiritual Court, by reason of Twede, the husband *de facto*, not being made a party to the proceedings by which his marriage was declared null; the Court, however, holding itself bound to give credit to the spiritual Court that the proceedings were regular. But the bearing of the case upon the point now under discussion is, whether it establishes a distinction between the contract to marry and *ipsum matrimonium*, and such seems the necessary inference. This was a trial before the Judges of the common law, who called for the assistance of civil lawyers to argue the case before them, but who must be supposed to know themselves what was the common law; and if the con-

(a) Moore, 27 & 28 Eliz.

(b) Moore, 169; and 4 Coke, 29 a.

tract *per verba de præsenti* between Bunting and Agnes had been what the common law had then recognized as an actual marriage, the second marriage would have been held void without any controversy ; no doubt would have existed, and no civilian would have been consulted, any more than if it had been a marriage celebrated *in facie ecclesiæ*. It is also not unworthy of remark, that the sentence of the spiritual Court, “ Quod prædicta Agnes subiret matrimonium cum præfato Bunting,” proves that not even by the ecclesiastical law, as administered in England, was such contract held to constitute a complete marriage without the intervention of the religious ceremony.

The case of *Wild v. Chamberlayne* (a) is so far of importance as it affords direct proof that in the opinion of * 666 Chief Justice PEMBERTON, on the trial of an issue * “ marriage or no marriage,” words of contract *de præsenti tempore*, repeated after a person in orders, was a good marriage ; for it was only by importunity of counsel a case was to be made thereof. If such a contract, alone and unaccompanied by a religious ceremony, had been a marriage, surely the case would have been decided on a shorter ground, and the objections, that the parson was an ejected minister, and that the ring was not used at the ceremony, according to the ritual of the Church of England, would never have been urged.

In the case of *Haydon v. Gould*, (b) Haydon and his wife were Sabbatarians, and married by one of their ministers in a Sabbatarian congregation, using the form of the Common-prayer, except the ring : but the minister was a mere layman, and not in orders ; and after administration granted to Haydon, and subsequently repealed, the Court of Delegates affirmed the sentence of repeal. The reason given is, “ That Haydon, demanding a right due to him as husband by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself in this case.” In this case, the book adds, it is urged that this marriage was not a mere nullity, because by the law of nature it was sufficient ; and

(a) 2d Shower, p. 300.

(b) 1 Salk. 119.

though the positive law ordains it shall be by a priest, yet that makes such a marriage as this irregular only, but not void; but the Court ruled *ut supra*; the reporter adding, that the constant form of pleading marriage is, “per presbyterium sacris ordinibus constitutum.” Perhaps the more correct expression might have been, “per ministrum sacris ordinibus constitutum;” for, undoubtedly, after the Reformation, a marriage might * be as well solemnized * 667 by a deacon as a priest. But what is the whole result of the case but this, that by the English ecclesiastical law a contract of marriage *per verba de præsenti* was not alone sufficient (for such contract there was in fact); but that by the same law, to make the marriage complete, there must be the presence and intervention of the priest? And when it is asked, as it was at your Lordships’ bar, what had the priest to do, or what had he to say? the answer must be, that he married them, and in doing so he used such form of words as were customary at the time of his performing the ceremony. The form of words of present contract found in the ritual of the Church of England as established by the authority of Parliament in the 2 and 3 Edw. 6, c. 1, was not then for the first time made, but in part altered and in part retained from the former rituals which had been handed down from the greatest antiquity: just as it was declared by the Council of Trent (Session 24, c. 1), when it prescribes certain words to be used by the parish priest when performing the office of matrimony; viz., “Ego vos in matrimonium conjungo, in nomine Patris et Filii et Spiritus Sancti.” The decree also adds, “vel aliis utatur verbis, juxta receptum uniuscujusque provinciæ ritum.”

The only remaining decision of a Court of Common Law, to which it may be necessary to refer, is the case of *The Queen v. Fielding*, upon an indictment for bigamy. (a) The evidence given of the first marriage was, that the parties made a contract *per verba de præsenti* in English, in the presence of and following the words of a priest in orders, though he was a priest in the orders of the church of Rome;

(a) 14 State Trials, 1327.

* 668 and Mr. Justice * POWELL, in summing up the case to the jury, more than once adverts to the fact that the marriage was by a priest. "If you believe Mrs. Villars," he says, "there was a marriage by a priest." There is no reason to infer from this direction to the jury, that if the first marriage in this case had been merely a contract *per verba de præsenti*, in the presence of a layman, the offence of bigamy must have been committed; but the inference to be drawn from the summing up of the Judge is directly the reverse.

My Lords, this being the state of the decided cases from the earliest time to the time of Queen Anne, the principal direct authority adduced on the part of the Crown is the *dictum* of Lord HOLT, in *Jesson v. Collins*, (a) "that a contract *per verba de præsenti* was a marriage, and this is not releasable;" and the decisions which have subsequently taken place. That case came before the Court upon a motion for a prohibition, upon a suggestion that the contract was in fact *per verba de futuro*, for which the party had remedy at common law, and the case was disposed of by the Court, and the prohibition refused, upon the ground that the spiritual Courts have jurisdiction of all matrimonial causes whatsoever, and that there was no reason to prohibit them, because this may be a future contract for breach of which an action at law will lie. This appears distinctly from the reports of the same case in 6 Modern, 155; and Holt's Reports, 457. This being the state of the case, HOLT, Chief Justice, in speaking to it before the Court, used the expression above referred to. It is obvious, in the first place, it was unnecessary to the case before the Court; for, whether present

* 669 words or future words, the prohibition * must equally be refused. The observation, therefore, is not entitled to the same weight and authority as if it had been the very point of the case before the Court. If by the terms "*ipsum matrimonium*" Lord HOLT intended to lay down the position that it was so held by the common law of the land, notwithstanding the unbounded respect which all who have succeeded him have ever felt and still feel for his learning and ability,

(a) 2 Salk. 437.

we cannot accede to his opinion. If, however, the observation was intended with reference to the civil law or the canon law of Europe, then it is perfectly correct; and that such was the intention of Lord HOLT we think abundantly clear from *Wigmore's Case*, which follows the former in the same page of Salkeld, and which was decided three years later than the first. In that case the husband was an Anabaptist, and had a license from the bishop to marry, but married this woman according to the forms of his own religion; *et per* HOLT, Chief Justice, "by the canon law, a contract *per verba de præsenti* is a marriage."

In Holt's Reports the expression is precisely the same, "by the canon law;" and Lord Chief Justice HOLT is there made further to say, "In the case of a dissenter married to a woman by a minister of the congregation who was not in orders, it is said that this marriage was not a nullity, because by the law of nature the contract is binding and sufficient; for though the positive law of man ordains that marriages shall be made by a priest, that law only makes this marriage irregular, and not expressly void; but marriages ought to be solemnized according to the rites of the Church of England to entitle the privileges attending legal marriage, as dower, thirds," &c. It cannot be supposed that Lord HOLT would limit the observation * to the canon law, as undoubtedly he did * 670 in *Wigmore's Case*, if it had been maintainable in the larger and unqualified extent supposed to have been stated by him in the case of *Jesson v. Collins*; and if the latter statement agrees with all the authorities, and the former is not, as we conceive, supported by or consistent with them, we are bound to infer, either that there is some error in the reporter, or that he really meant the proposition to be limited to its more restrained sense.

My Lords, this *dictum* of Lord Chief Justice HOLT is of the more importance because it appears to have been the origin of all the subsequent opinions expressed by different Judges to the same effect. When Sir WILLIAM SCOTT lays it down as the law recognized by the temporal Courts of this kingdom, he cites this *dictum* of Lord Chief Justice HOLT, which he observes (as he is justified in doing by the report in 6

Modern) was agreed to by the whole Bench. When GIBBS, Chief Justice, makes the same observation, he expressly relies on the authority of Sir WILLIAM SCOTT; *Latour v. Teasdale*. (a) When Lord KENYON makes a similar observation, probably on the same authority, observe how carefully he guards himself: "I think," he says, "though I do not speak meaning to be bound, that even an agreement between the parties *per verba de præsenti* is *ipsum matrimonium*;" *Reed v. Passer and Others*. (b) When Lord ELLENBOROUGH lays down the same doctrine in *Rex v. The Inhabitants of Brampton*, (c) he is giving judgment in a case of a marriage *per verba de præsenti* celebrated by a priest (though whether Roman Catholic or

Protestant, he says, does not appear); and when he * 671 refers to the * authority of HOLT, Chief Justice, it is clear he considered Lord HOLT to have been speaking of a marriage through the intervention of a priest. It is therefore of very great importance to estimate justly the weight of Lord HOLT's observation, when contrasted with the large field of authorities which has been opened; upon which authorities I have been longer occupied, because the question whereon we are called to answer depends upon the common law of England, of which the ecclesiastical law forms a part.

It will be improper, however, to close the discussion of this part of the case without adverting to an argument urged at your Lordships' bar, upon which some reliance appears to have been placed; namely, the state of the marriages of Quakers (all doubt as to which marriages is now set at rest by the statute passed in 1835) and of Jews.

The argument in substance was this: that as the persons professing the opinions of those respective persuasions celebrated their marriages according to their own peculiar rites, which necessarily excluded the intervention of a person in holy orders, according to the sense which those words are asserted to convey; and as their marriages have been held legal with respect (as it is argued) to all the consequences attending marriage, such as legitimacy, administration, and

(a) 8 Taunt. 832.

(b) Peake's N. P. 303.

(c) 10 East, 289.

other civil rights ; so the validity of such marriages can only be grounded upon the assumption that a contract of marriage *per verba de præsenti* did by law constitute a marriage itself.

Since the passing of the Marriage Act, it has generally been supposed that the exception contained therein, as to the marriages of Quakers and Jews, amounted to a tacit acknowledgment by the legislature that a marriage, solemnized with the religious * ceremonies which they were respec- * 672 tively known to adopt, ought to be considered sufficient ; but before the passing of that Act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage on the ground that it was a marriage by contract *per verba de præsenti* ; but, on the contrary, the inference is strong, that they were never considered legal. The legislature, in the Statute 6 & 7 Will. 3, c. 6, § 63, enacts, that all Quakers and Jews, and any other persons who should cohabit and live together as man and wife, should pay the duty thereby imposed on marriages, and that upon every pretended marriage made by them they should give five days' notice ; with an express provision in the sixty-fourth section, that nothing in the Act contained should be construed "to make good or effectual in law any such marriage or pretended marriage, but that they should be of the same force and virtue, and no other, as if the Act had not been made." And the case before Lord HALE, to which so much weight was attributed, as conveying his opinion that the marriage was good, appears rather to show his opinion to have been the reverse. He declared "that he was not willing, on his own opinion, to make their children bastards ; and gave directions to the jury to find it special : " a declaration which plainly intimates that the inclination of his own mind was that the marriage was not good. We cannot, therefore, think that the case of the Quakers, although certainly one which it is difficult altogether to dispose of, amounts to such a difficulty as to induce us to alter the opinion founded on the authority of the decided cases.

And as to the case of the Jews, it is well known that

in early times they stood in a very peculiar and
 * 673 *excepted condition. For many centuries they were
 treated, not as natural-born subjects, but as foreigners,
 and scarcely recognized as participating in the civil
 rights of other subjects of the Crown. The ceremony of
 marriage by their own peculiar forms might, therefore, be
 regarded as constituting a legal marriage, without affording
 any argument as to the nature of a contract of marriage *per*
verba de præsenti between other subjects. But even in the
 case of a Jewish marriage, it was more than a mere contract;
 it was a religious ceremony of marriage; and the case of
Lindo v. Belisario is so far from being an authority that a
 mere contract was a good marriage; that the marriage was
 held void precisely because part of the religious ceremony
 held necessary by the Jewish law was found to have been
 omitted.

I proceed now to refer to certain statutes passed by the
 legislature at different times; from various enactments and
 expressions in which statutes the inference appears to follow,
 that a mere contract *per verba de præsenti* could not at those
 several times have been generally held to constitute complete
 marriage.

The Statute 32 Hen. 8, c. 38, for marriages to stand notwithstanding precontracts, in its preamble gives no support to the doctrine, that by the law of England the contract *per verba de præsenti* was an actual marriage. It recites the mischief, that after divers marriages have been solemnized and consummated, and fruit of children, “nevertheless, by an unjust law of the bishop of Rome, which is that upon pretence of a former contract made and not consummate, the same were divorced and separate;” and then proceeds to enact, that every marriage, being contracted and solemnized

in face of the church, and consummated, or with fruit
 * 674 of children, shall be *deemed lawful, good, and indissoluble, notwithstanding any precontract, not consummate, which either party shall have before made.

The Statute 2 & 3 Edw. 6, c. 28, enacts that, as concerning precontracts, “the former statute should be repealed, and be reduced to the state and order of the King’s ecclesiastical

laws of this realm ” (an expression of no slight importance, when considered with reference to the force within this kingdom of the general canon law of Europe), “ which before the making of the said statute were used in this realm ; so that, when any cause or contract of marriage is pretended to have been made, it shall be lawful to the King’s ecclesiastical Judge of that place to hear and examine the said cause, and (having the said contract sufficiently and lawfully proved before him) to give sentence for matrimony, commanding solemnization, cohabitation,” &c. The language of the legislature in this Act does surely imply a marked and acknowledged distinction between contract and matrimony. To refer next to the statutes passed relating to the marriages of priests, the 31st Hen. 8, c. 14, punishes with death any priest who shall carnally keep or use any woman “ to whom he is or shall be married, or with whom he hath contracted matrimony ; ” thus assuming the contract to be one thing, actual matrimony to be another, although visiting both offences with the same measure of punishment.

The Statute 12 Chas. 2, c. 33, entitled “ An Act for Confirmation of Marriages,” enacts, “ that all marriages had and solemnized after a certain day, before any justice of the peace, shall be adjudged and taken to be of the same and of no other force and effect as if such marriage had been had and solemnized * according to the rites and ceremonies * 675 established or used in the church or kingdom of England.” It is true that that Act is declared to be passed “ for the preventing and avoiding all doubts and questions touching the same ; ” but as the Act or ordinance referred to contained a form of contract *per verba de præsenti* of the most accurate and precise description, and before witnesses, it affords ground to infer that a contract of that nature had not, in the general opinion, the force of an actual marriage : and observe how very strong the inference is from the proviso, “ that issues on the point of bastardy or lawfulness of marriage, depending on these marriages, should be tried by a jury.” Why not let them go to the Ecclesiastical Court, as before, if by the law of that Court the contract *per verba de præsenti* was held an actual marriage without any religious ceremony ?

The Statute 7 & 8 Will. 3, c. 35, passed to enforce the laws which restrain marriages without license or banns, had for its object the levying a revenue by the stamps imposed by a former Act upon licenses of marriages. For this purpose it lays a penalty of 10*l.*, by the fourth section, “on every man so married without license or publication of banns as aforesaid;” that is, upon reference to the preceding clause, “married by any parson, vicar, curate, or other minister as their substitute.” If the legislature had thought a contract *per verba de præsenti* before any person not being in holy orders was a valid marriage, it surely would not have left the remedy so defective, but would have enacted that every man married without a license shall be made liable to the penalty.

The Statute 10 Anne, c. 19, is an Act for raising money for the use of the kingdom; and in section 176 provision is made to prevent the great loss of duties * on marriage licenses which had been sustained by the frequency of clandestine marriages. The provision is, that every parson, vicar, or curate, or other person in holy orders, who shall after a certain day marry any person in any church or chapel, or in any other place whatsoever, without publication of banns, or without license first had from the proper ordinary for such marriage, shall forfeit 100*l.* Would this penalty have been limited to the case of marriage by a person in holy orders, if it had been conceived by the framers of the Act that a contract *per verba de præsenti* alone, without the aid of a priest, had constituted a complete marriage? The inference arising from these Acts is not certainly so very strong, but whatever inference can be drawn has a tendency to support the opinion at which we have arrived.

The various Acts of Parliament which have been passed from time to time, and which have been referred to in the course of the argument, imposing penalties on the solemnization of marriages by Roman Catholic priests in Ireland, between Protestants, or between a Protestant and a Roman Catholic, and nullifying such marriages, are founded in good sense, and with a view to attain a definite object, upon the supposition that the presence of a priest is necessary to make the marriage good, and upon that supposition only; but they

are a mere dead letter, if the contract *per verba de præsenti* without the priest makes the marriage. And if this is no proof, as perhaps it is not, that such was necessarily the law, it is at least a proof that it was the prevailing general opinion, both amongst the people and the government, that by law the presence of the priest was essential to the contract. \

But upon referring, in the last place, to the Statute 26 Geo. 2, c. 33, the Act for the better preventing * clandestine marriages, it will be found that the * 677 provisions thereof throw a stronger light upon the subject. If a contract *per verba de præsenti* had been considered by the legislature as "*ipsum matrimonium*," one would have expected that all such contracts made after the Act came into force, if not made illegal, would at least be declared null and void. There could have been no more effectual mode of suppressing clandestine marriages; but there is no such enactment. The only clause that affects these contracts is the 13th, which enacts only "that no suit or proceeding shall be had in any Ecclesiastical Court in order to compel a celebration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony whatsoever, whether *per verba de præsenti* or *per verba de futuro*, which shall be entered into after the 25th March, 1754." These contracts *per verba de præsenti* are still, therefore, lawful, though they cannot be enforced in an Ecclesiastical Court. If these contracts did not before and at the time of passing the Act constitute a valid marriage, but were only the necessary means, the basis, for enforcing the solemnization, there is then no injury in leaving them as they were; but if they ever constituted a valid marriage of themselves, not being made null by the Act, so do they still; and then may some great and almost inextricable difficulties occur from the absence of such provision.

Before the passing of the Act, and indeed since, put the case that A. made a contract of marriage *per verba de præsenti* with B., and then, in the lifetime of B., marries C. *in facie ecclesiæ*, and that he has children at the same time both by C. and B.; B. dies; are the issues of both legitimate? It is clear from the decisions, that the issue of A. and C.

* 678 are legitimate ; * and if the argument on the part of the Crown, that the contract with B. makes the marriage, be well founded, the issue of B. is legitimate also. Suppose two sons, born at the same time, one from each mother, a possible event, which is the eldest son and heir ? This and many more cases of difficult solution may be put, if the contract *per verba de præsenti* was by the English law held to be actual marriage ; and from these considerations arises the necessary inference that it was not ; and thus do arguments from the enactments of the legislature combine and agree with the authority of the decided cases, to prove that such never was the law of England.

" My Lords, I proceed, in the last place, to endeavour to show that the law by which the spiritual Courts of this kingdom have from the earliest time been governed and regulated is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those Courts *proprio vigore*, but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical constitutions of our archbishops and bishops, and by the legislature of the realm, and which had been known from early times by the distinguishing title of the King's Ecclesiastical Law. And if it shall appear, upon reference to this law, that there is no incontrovertible authority to be found therein that marriage was held to be complete before actual celebration by a priest, the absence of such direct authority in the affirmative is sufficient to justify us in drawing the conclusion already formed, that the contract alone is not by the law of England the actual marriage. The result, however, of a somewhat hasty consideration of the authorities upon

* 679 this * question (for the due research into which we were anxious to have obtained a longer time) appears to us to be, that no such rule obtained in the spiritual Courts in this kingdom."

It would scarcely have been necessary to have entered upon this part of the discussion, had it not been for the observations made by Sir WILLIAM SCOTT, in the case of *Dalrymple v. Dalrymple*. That very learned Judge, after laying

down in his deservedly celebrated judgment in that case, that marriage is a contract of natural law and of civil law also, proceeds to observe, "that when the natural and civil contract was formed, the law of the church, the canon law, considered it had the full essence of matrimony without the intervention of the priest;" which canon law is then stated by that eminent Judge to be "the known basis of the matrimonial law of Europe." The observation upon which so much reliance has been placed by the counsel for the Crown then follows: "that the same doctrine is recognized by the temporal Courts as the existing rule of the matrimonial law of this country;" although certainly the observation is in some degree qualified by the expression, "that the common law had scruples in applying the civil rights of dower and community of goods, and legitimacy, in the cases of these looser species of marriage."

My Lords, as we have already stated, in the opinion we have given, that we do not conceive it to be part of the law of the temporal Courts, that "when the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest," it is only proper to state, in the first place, that the entertaining, as we do, a different view of this subject from that eminent Judge, does not in any * manner whatever break in upon the * 680 authority of the decision in the case of *Dalrymple v. Dalrymple*.

The doctrine of the temporal Courts in England had no bearing at all upon a question which was to be decided solely by the law of Scotland; which country, it is well known, differs materially from ours in many of its legal institutions, and in none more pointedly than those which relate to marriage and legitimacy. Again, it was of no importance in that case whether the canon law of Europe was introduced into England as part of the law of the land; the only question necessary for the decision of the case then before the Court being, whether such canon law was introduced or not into the law of Scotland. The opinion, therefore, of that eminent person, so far as regards England, was uncalled for and extrajudicial; and upon that ground the question before us

must be considered as unfettered by the weight of such great authority, and open to the most free discussion.

But that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law. Lord HALE defines the extent to which it is limited very accurately. "The rule," he says, "by which they proceed is the canon law, but not in its full latitude, and only so far as it stands uncorrected either by contrary Acts of Parliament or the common law and custom of England; for there are divers canons made in ancient times, and decretals of the popes, that never were admitted here in England." (a)

Indeed the authorities are so numerous, and at the same times so express, that it is not by the Roman canon * 681 law that our Judges in the spiritual Courts * decide questions within their jurisdiction, but by the King's ecclesiastical law, that it is sufficient to refer to two as an example of the rest. In *Caudrey's Case*, (b) which is intitled "Of the King's Ecclesiastical Law," in reporting the third resolution of the Judges, Lord COKE says, "As in temporal causes the King, by the mouth of the Judges in his Courts of Justice, doth judge and determine the same by the temporal laws of England, so in cases ecclesiastical and spiritual, as, namely" (amongst others enumerated), "rights of matrimony, the same are to be determined and decided by Ecclesiastical Judges according to the King's ecclesiastical law of this realm;" and a little further he adds, "So, albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, and allowed here, by and with a general consent, are aptly and rightly called 'The King's Ecclesiastical Laws of England.'" In the next place, Sir JOHN DAVIES, in *Le Case de Commendams*, (c) shows how the canon law was first introduced into England, and fixes the time of such introduction about the year 1290, and lays it down thus: "Those canons which were received, allowed, and used in England, were made by such allowance and

(a) Hale's Hist. of Comm. Law, c. 2.

(b) 5 Co. Rep. 1.

(c) Sir J. Dav. 69 b, 70-72 b; ante, p. 612.

usage part of the King's ecclesiastical laws of England, whereby the interpretation, dispensation, or execution of those canons, having become laws of England, belong solely to the King of England and his magistrates within his dominions : " and he adds, "yet all the ecclesiastical laws of England were not derived and adopted from the court of Rome ; for long before the canon law was authorized and published " (which * was after the Norman Con- * 682 quest, as before shown), "the ancient Kings of England ; viz., Edgar, Athelstan, Alfred, Edward the Confessor, and others, did, with the advice of their clergy within the realm, make divers ordinances for the government of the Church of England ; and after the Conquest divers provincial synods were held, and many constitutions were made in both the kingdoms of England and Ireland ; all which are part of our ecclesiastical laws of this day."

We therefore can see no possible ground of objection to the inquiry, whether before the introduction of the canon law any law existed upon the subject of marriage differing from that of the canon law, and not afterwards superseded thereby ; and when we find, in the collection of ancient laws and institutes of England published by the commissioners of public records, amongst the laws of Edmund, one which directs that at the nuptials there should be a mass-priest by law, who shall, "with God's blessing, bind the union to all prosperity," we can see no more ground to doubt the existence of this law (which does not now make its appearance for the first time, but was published by Wilkin (*a*) in the last century) than any other document of antiquity which has been received as genuine without hesitation.

The council held at Winchester in the time of Archbishop Lanfranc, in the year 1076, (*b*) contains a direct and express authority with a nullifying clause, that a marriage without the benediction of the priest should not be a legitimate marriage, and that other marriages should be deemed fornication. Numerous councils follow, in which are decrees to prevent

(*a*) See Wilkins's Concilia, 367.

(*b*) Johnst. Ecc. Law, A.D. 1076, § 5.

* 683 and *punish clandestine marriages, but in no one of which is there any repeal, express or implied, of the rule laid down by the first; viz., that the presence of the priest is necessary to constitute a legitimate marriage; but the time of the marriage by the priest, the place where it is to be celebrated, and other regulations, are prescribed, in order to meet the evil which was then existing. That the marriage, though called clandestine, was still a marriage celebrated by a priest, and so assumed to be, is placed beyond all doubt by the 11th Constitution of Archbishop Stratford, established by the Council of London: (a) “De celebrantibus matrimonium clandestina in ecclesiis oratoriis vel capellis.” That constitution recites in effect, that people left their own places of residence, where the impediments to their marriage were notorious and their parish priests not disposed to solemnize their marriage, and betook themselves to populous places where they were unknown, in order that “aliquoties in ecclesiis aliquando in capellis seu oratoriis matrimonia inter ipsos de facto solemnizari procurent.” What is this but a plain assumption that the marriage so celebrated was celebrated by a priest? for surely none others but persons in holy orders could celebrate them in churches, chapels, or oratories.

The authority of John De Burgo, a dignitary of the Church of England, was much relied on, as a direct proof that a contract *per verba de præsenti* was sufficient to constitute complete matrimony, without the presence or intervention of a priest. The materials of his work, bearing the quaint title of *Pupilla Oculi*, were compiled in 1385, and the work itself printed at Paris; but afterwards, in the year 1400,

* 684 *an edition was printed in London, “*Omnibus presbyteris precipue Anglicanis summe necessaria.*” The work contains, amongst other things, a treatise on the Administration of the Seven Sacraments; and under the head “*De sacramento matrimoniali*” occurs the passage relied on by the Crown. The author lays it down, “Of the minister of this sacrament it is to be observed, that no other minister is to be required distinct from the parties contracting; for they them-

(a) Johnst. Ecc. Law, A.D. 1848, § 11; 2 Wilkins's Concilia, 706.

selves for the most part minister this sacrament to themselves, either the one to the other, or each to themselves." And a little further he adds, "Scotus says, that to the conferring of this sacrament there is not required the ministry of a priest, and that the sacerdotal benediction which the priest is wont to make or utter upon married people, or other prayers uttered by him, are not the form of the sacrament nor of its essence, but something sacramental pertaining to the adorning of the sacrament." From this passage it is clear that, whether absolutely necessary or not, it was at least usual and customary at that time to make the contract before the priest. It appears further, from the first words of the following chapter, "*De matrimonio clandestino*," that such course was ordered by the church: "*Inhibitum est contrahere nuptias occulte, sed publice, coram sacerdote, sunt nuptiæ in Domino contrahendæ.*" If, therefore, in the passage above cited, the author intends to express thus much only, and no more; viz., that by the contract *per verba de præsenti*, made privately between themselves, that mysterious sacrament of which he is speaking has been taken by them which makes the contract indissoluble and capable of being enforced by either against the other *in facie ecclesiæ*, such doctrine is admitted to be consistent with the *ecclesiastical law received in England; but * 685 if it is supposed to mean more, if it is held up as an authority that the marriage is complete for all civil purposes of legitimacy, dower, and other civil rights, then, before we accede to the proposition, it is the safer course to discover, if possible, whether the doctrine of the text-writer is or is not consistent with the recognized laws and constitutions of the Church of England then in force, and with the course and practice of the Ecclesiastical Courts of England at that time, and in case of a discrepancy between them, to reject the authority of the text-writer, and to adhere to that of the recognized law and the practice of the Courts; for there is no surer evidence of the law in any particular case than the course and practice of the Courts in which such law is administered. We should treat the best of our text-writers, Sir WILLIAM BLACKSTONE, for example, precisely in the same way.

Now, at the time of the publication of John de Burgo, and of the other work, intitled “*Manipulus Curatorum*,” cited for the same purpose, there stood, unrepealed by any subsequent constitution of the church, both the constitution of Lanfranc, before stated, and the subsequent constitutions of the church against clandestine marriages: the former directly declaring the presence of the priest at the marriage to be necessary to give it validity; the latter implying such necessity. I ask whether the Courts of Ecclesiastical Law of England would take the law, if the very point in controversy was brought before them, from the text-writers of the day, or from the constitutions of the church? I doubt not, however learned or in whatever estimation the text-writers might be, it would

be from the law of the church; and as to the course
 * 686 * and practice of the Courts of Ecclesiastical Law in respect to a matrimonial suit to enforce marriage upon a contract *per verba de præsenti*, the prayer upon the libel has been, not to pronounce that the parties are already actually and completely married, but that it may be pronounced “for the validity, full force, and strength of the said contract of marriage, to all effects and intents in law whatsoever; and that the defendant may be compelled to solemnize the said marriage in the face of the church:” (a) just as in *Bunting’s Case*, before cited, the decree was not that Agnes was married, but that Agnes “*matrimonium subiret*.”

And when reference is made to Oughton, (b) the same appears more distinctly to be the form of proceedings; and it would be most singular, if the contract *per verba de præsenti* was considered by the Court as an actual complete marriage, that a provision should be made for the Court to inhibit the party, “*pendente lite*, from contracting matrimony, or procuring matrimony to be solemnized.” If the Court held the first marriage to be entirely complete, surely the Statute of James, which had then been passed more than a century, and which made the second solemnization a felony, would have been a surer protection than the inhibition of the Court. But the necessary inference is, that the Court could not have so held

(a) Clerk’s Instructor, 326.

(b) Vol. 1, 283.

the effect of the contract; and it follows, therefore, that the authority of the passages above cited cannot be safely relied on against the constitutions of the church and the practice of the spiritual Court.

We now pass to the consideration of the particular circumstances involved in the first question proposed * by your Lordships, which supposes this marriage to * 687 have taken place in the house and in the presence of a placed and regular minister of the congregation of Protestant dissenters called Presbyterians.

As we have already stated our opinion, that to make the marriage a complete marriage, it must be solemnized in the presence of a minister in holy orders, it is only necessary to look back to the time when that law first obtained in England to enable us to answer that question without difficulty.

At the early period when such law arose, and down to a comparatively recent period, the expression priest, curate, minister, deacon, and person in holy orders, which are the words met with in the different constitutions and councils and authorities bearing on the subject, could point to those persons only who had received episcopal ordination; there were no others known at all; all but they were laymen; and unless some Act of the legislature has interposed its authority, and given the Protestant dissenting minister in Ireland the same power for this purpose as the persons in holy orders did before possess, we think the entering into the contract in his presence cannot, in the legal sense of the word, be held to be entering into it in the presence of a person "in holy orders." Now no statute has been brought forward, except the 21st & 22d Geo. 3, c. 25 (Irish): but the operation of that statute is limited to matrimonial contracts or marriages between Protestant dissenters, and solemnized by Protestant dissenting ministers or teachers; and as your Lordships' question goes on to state that one of the contracting parties in this case is not a Protestant dissenter, but a member of the Established Church of England and Ireland, it follows that the case does not fall within that statute, and * that * 688 it must be decided as if that statute had never been passed.

My Lords, the two subsequent conditions or circumstances contained in your Lordships' question can obviously make no difference. The form of the religious ceremony cannot, upon any principle or upon any authority, compensate for the want of the presence of the proper minister, assuming such presence to be necessary; nor can the circumstance of subsequent cohabitation carry the validity of the marriage higher than the original force of its obligation.

The main and principal point, however, of your Lordships' first question still remains to be answered; viz., whether, after such a contract entered into between A. and B., whether A., by marrying C. in England whilst B. is still living, commits the crime of bigamy?

And after the full discussion of the general question, and our opinion already declared, that the first contract does not amount to a marriage by the common law, it is hardly necessary to say that we hold the offence of bigamy has not been committed. Indeed, independently altogether of the answer we have given to that abstract question, and admitting, for the sake of argument, that the law had held a contract *per verba de præsenti* to be a marriage, yet, looking to the statute upon which this indictment is framed, we should have thought, upon the just interpretation of the words of that statute, the offence of bigamy could not be made out by evidence of such a marriage as this. The words are, "If any person, being married, shall marry any other person during the life of the first husband or wife;" words which are almost the very same as those in the original statute of

James 1. Now the words "being married," in the
* 689 first clause, * and the words "marry any other person,"

in the second, must of necessity point at and denote marriage of the same kind and obligation. If, therefore, a marriage *per verba de præsenti*, without any ceremony, is good for the first marriage, it is good also for the second; but it never could be supposed that the legislature intended to visit with capital punishment (for the offence would be capital if the plea of clergy could be counter-pleaded) the man who had in each instance entered into a contract *per verba de præsenti*, and nothing more. Waiving, however, that consid-

eration, it is enough to state to your Lordships, as the answer to the first question, that in our opinion A. did not, under the circumstances therein stated, commit the crime of bigamy.

My Lords, we have so fully and pointedly answered the second question proposed by your Lordships, in stating the grounds of our first answer, that it is unnecessary to trouble you with any further observation thereon, except that as the Statute of 58 Geo. 3, c. 81, has enacted that no suit shall be had to compel the celebration of such a contract in any Ecclesiastical Court in Ireland, we think this question also should be answered in the negative.

In conclusion, I would only observe, that, although I am authorized to state that our opinion on the questions proposed to us is unanimous, yet I ought to add that my learned brethren are not to be held responsible for the reasoning upon which I have endeavoured to establish the validity of that opinion.

LORD BROUGHAM. — My Lords, in rising to move that the opinions of the learned Judges be printed, I am sure I only anticipate that which must have been the feeling of every one of the noble Lords who have * heard the * 690 argument in this case, — a feeling of great gratitude to the learned Judges for the extraordinary attention which they have bestowed upon this most important case, and for the great pains which they have taken in investigating the grounds of the opinions they were about to submit to your Lordships, and of peculiar thankfulness to the learned Judges for their having done so in circumstances which, from what passed the last time that they were here, must be understood to have imposed peculiar difficulties upon them, — I mean the extent, variety, and urgency of their occupations, with which the great attention they have bestowed upon the question must needs have interfered.

I hope, therefore, my Lords, that as I most heartily and sincerely thank their Lordships for the able statement of their opinions with their reasons, which we have just now heard from my right honourable friend the Chief Justice of the Common Pleas, I shall not be suspected of derogating at

all from that respect, from that profound deference which I owe to their opinion, or of at all retracting what I have said in expressing my gratitude and your Lordship's gratitude (for I assume that I do express your opinions and feelings as well as my own in so thanking the learned Judges), if I proceed to state, in a very few words, my deep regret at finding that, though there have been considerable fluctuations and doubt in the minds of some of the learned Judges, yet — that as in the end they have all acceded to the result, though not bound by the reasons upon which that result is made to rest, — my regret that we have not had the benefit of those arguments and those views which had at first given rise to

considerable fluctuation and doubt in the minds of
 * 691 some of those learned persons, and of the * process of reasoning by which that fluctuation was made to subside into calm, and by which the doubts were, to a certain degree at least, removed.

My Lords, I can very well imagine, being now left to my own conclusions from not having heard them stated, — I can very well imagine the grounds of the fluctuation, and the foundation of those doubts ; for, in the first place, it is to be observed that we have now heard the learned Judges come to a conclusion, into which if we shall follow them, we neither more nor less than lay down this proposition, — startling to me, I confess, — novel to my mind, I admit, — that England is the only country in Christian Europe which has adopted this peculiar law ; that all Christian Europe being one great moral territory, — one great field, over which law extends, — one great mass of people bound together by, and living together under, the same system of polity ecclesiastical, — living together under the same system of faith Christian ; namely, the catholic faith of all Christian people, — that all this body holding the same doctrine respecting marriage, and exercising the same jurisdiction touching marriage rights, founded upon the same system of religious and civil polity, whether it be derived from the civil law as its fountain, or from the canon law in its connection with the common catholic faith of Europe, — that all this mass of people, that all these realms, with all their jurisdictions, lay and clerical, have

one rule, one guide, one system, one polity, one law, but that England alone is the one solitary but prominent exception to that law, that rule, that polity, that system, and alone adopts a principle, not only irreconcilable with, but in diametrical hostility and opposition to, the polity and the legal and ecclesiastical system of all Christian Europe.

* My Lords, finding that this is a case of such ex- * 692
ception, I naturally am led to look to see whether the Judges, in dealing with these questions, have not held that the community and universality of the canon law is of the utmost possible weight in determining the particular law of any one given country. And I find some of the most venerable authorities, particularly Lord STOWELL, precisely adopting that very view, and resting his judgment as to what was the law of one country, namely, Scotland, upon that ground, — I am speaking now of what clearly is not extrajudicial, for it is the decision itself, — resting his opinion as to what must have been the law of Scotland upon his opinion or his knowledge of what was the law of all Europe, and therefore holding that, until you displace the general law by proving Scotland to be an exception, until you show that there are either decisions of the Courts or Statutes made in Scotland to take it out of the common law of Europe, — he should hold it to be the law of Scotland, because it was the law of the rest of Christian Europe. It is clear, therefore, what Lord STOWELL's opinion would have been upon this most fundamental point. It is clear that he would have felt the same difficulty which I feel in coming to a conclusion which excepts England from every other country in Europe, — England, in which the catholic religion was the same, — England, in which the ecclesiastical law was the same, and from whose decision there lay an appeal to the same common forum of appeal; namely, the pope at Rome, till the Statutes of Henry 8 took it away, and severed us from the catholic church, — that England should be an exception to all Europe, he would have found the same difficulty in believing the possibility of, which I now feel, and which must, therefore, have been one of the grounds * of fluctuation and of the doubt in the minds * 693
of some of the learned Judges to which my right

honourable and learned friend the Chief Justice has referred.

My Lords, there is another ground of fluctuation and doubt, and another very startling consequence, which I also feel grievously oppressive, if I am to come to the same conclusion at which the majority of the learned Judges have arrived, and to which they have all acceded, — upon what reasons we have not been informed. If we come to that conclusion, I also affirm this, that many, many persons are unmarried, who have thought that they were married ; that many, many husbands have now a right to bid their wives, or supposed wives, *abire et sibi habere res suas* ; that many, many children who have hitherto hoped and believed that they were legitimate, are now bastards ; and that not only is that the case with respect to the *status* of the parties, and that not only may notice be given instantly in Ireland by those husbands who no longer wish to have their wives as wives, or by those wives who no longer may wish to have their husbands as husbands ; but that, supposing a question of pedigree shall arise in any of the Courts of Ireland or England, and that a link of that pedigree shall depend upon a marriage had twenty or thirty years ago between the parents of the alleged legitimate heir through whom the claim is made, or through whom the title is deduced ; the proof that that marriage comes within the scope of this decision, that it was only *per verba de presenti* and before a Presbyterian parson, not a priest in holy orders, is fatal to the marriage, and fatal to the legitimacy as one of its necessary links. Now, my Lords, has, or not, the common opinion been very prevalent, very universal, that these marriages were valid ? I cannot answer that question in the negative.

* 694 * THE LORD CHANCELLOR. — Will my noble and learned friend allow me to suggest, whether the prudent course would not be, that we should for the present abstain from making any observation upon the case, and consider what course we should take ? It is a subject of the deepest interest upon which we have now heard the unanimous opinion of the Judges here. We know that in Ireland

the Judges were equally divided : and upon a subject of such deep and vital interest and importance, I should propose that we should consult together, and consider what course we ought to take, but that it is not at present advisable to suggest what that course shall be.

LORD BROUGHAM. — I cannot, certainly, mean now to suggest the course, but what I meant to say is this : my noble and learned friend must be aware that it is going out to Ireland, by this night's post, that the learned Judges have given their unanimous opinion upon this point. What I am about to state is to bring comfort to the minds of some, and to give warning to other parties how they act upon this opinion. It appears to me to be of paramount importance that they should have that comfort, in the first place ; and, if it be possible, of still more importance that, in the next place, they should have this warning ; otherwise you may have parties marrying again upon the faith of this decision if they look upon this as a decision, and they may marry to their cost, because nothing follows from this. It does not follow from this, in the first place, that your Lordships shall agree with the decision of the learned Judges ; and it still less follows, that if you do agree with that decision, no legislative Act would pass. Therefore, my Lords, I hold that this warning ought to be given to the Queen's subjects in Ireland, * that no intermediate marriages may take place, * 695 though the learned Judges are of opinion that such marriages would not be bigamous. People must not go away with the idea, that because the learned Judges have come to this opinion in the circumstances to which I have adverted, therefore your Lordships will agree in that opinion, and that those second marriages would be valid, as they are according to the opinions of the learned Judges ; whereas they may be in the opinion of your Lordships, notwithstanding that opinion of the learned Judges, bigamous and void.

My Lords, I had arrived at the end of what I was about to submit to your Lordships, with one single exception ; and I beg the attention of your Lordships to this observation, the

last with which I now proceed to trouble you. I have known cases in which plain and manifest errors have crept into the law; I have known those cases brought before your Lordships for consideration; I have known a very remarkable instance, where the error was upon the very face of the principle introduced, — I mean that case respecting the addition of twenty-one years to lives in being, with respect to the validity of an entail of lives in being, and where the foundation of the error was plain, and it was manifest that it was originally wholly groundless in law. When *Cadell v. Palmer* (a) came before your Lordships, when I had the honour of presiding in this House, that question was raised and argued at the bar, and your Lordships had the benefit of the assistance of the learned Judges, who were all of opinion, and I argued myself that case upon that ground, and so your Lordships were pleased to determine, that though clearly and undeniably it all rested upon an error; though the

* 696 origin of the mistake was plain, * namely, the non-existence of a person, till twenty-one years after the lives in being, who could suffer a recovery or levy a fine to bar the remainder over; though the origin of the principle was clearly proved to be first of all an error; yet, as so many years had passed in which the principle had been received, and so many titles depended upon it, and as so great mischief could arise from undoing it and taking the opposite course, the error was admitted *facere jus*, and the decision was made according to that, and so it now remains the law. My Lords, I can hardly conceive any case which more required the application of that remedial principle I venture to submit to the wisdom of your Lordships, than does the present: considering the delicacy and importance of the rights both of parents and children; considering the shake to be given to settled titles to property; considering the wide-spread consequences of affirming this doctrine, I can hardly conceive a case which more would have admitted, or more would have required, the application of that principle. To go no further

Ante, Vol. 1, p. 372.

back than the judgment of Sir WILLIAM SCOTT, which has been held to make the law ever since that judgment was pronounced; Sir WILLIAM SCOTT corrected with his own hand every line and word and letter of that judgment, and that judgment proceeded upon the adoption of the principle to which I have referred; and it was not an extrajudicial opinion; it was the corner-stone of that judgment of Sir WILLIAM SCOTT.

My Lords, it is upon these grounds that, repeating my thanks and my expressions of gratitude, on the part of your Lordships as well as of myself, to the learned Judges, for the pains which they have bestowed upon this question, I shall venture to hope that very full consideration will be given to those arguments * which the learned * 697 Judges have adduced in support of the opinion which they have given to your Lordships; and that, after having fully considered those arguments, if you find unhappily that you should be obliged to arrive at the same conclusion, it will be a matter of still more anxious consideration to provide that remedial measure of legislation which will become necessary should you affirm this judgment.

THE LORD CHANCELLOR. — I move your Lordships that the further consideration of this case be adjourned. I will only say that I subscribe entirely to what my noble and learned friend has stated with respect to the extreme obligation which we owe to the learned Judges, for the attention which they have given to this case.

LORD CAMPBELL. — My Lords, I entirely and heartily concur with the sentiments expressed by both my noble and learned friends, in giving all praise to the learned Judges for the manner in which they have considered this question. For the present, my Lords, I abstain from expressing any opinion of my own upon the subject. It is a matter of such unspeakable importance, that I am afraid to trust myself at present to express any opinion upon it.

My Lords, the opinion delivered by the learned Judges is

entitled to be received with the most profound respect: at the same time, your Lordships are well aware that you are not bound by it. You have the great advantage of consulting the learned Judges, and asking for their opinions upon any matter of law that arises in the performance of your functions, either as Judges or as legislators; and to the opinions of the learned Judges you will always pay the most profound respect, and the strongest presumption arises

* 698 that what * they declare to be the law, is the law.

But still, when you are to decide as Judges, you must decide upon your own opinion; you must conscientiously believe that the law is that which you pronounce it to be.

My Lords, I shall consider the reasons assigned by the learned Chief Justice with every possible respect, and every desire, I may say, to concur in the opinion which he has announced, because it would be with great reluctance that I should differ from the opinion of the learned Judges. At the same time, I cannot disguise from myself and from your Lordships that it is with some reluctance that I should arrive at a conclusion which would declare that Quakers and Jews, believing that they were living in a state of lawful matrimony, had been living in a state of concubinage, and that their children, who have been supposed to be legitimate, are all to be considered as bastards. It would be with some reluctance that I should come to that conclusion; and also that marriages performed by Presbyterian ministers in England, in India, and in other parts of the Queen's dominions, which have been considered to be lawful, are unlawful, and that the parties are living in a state of concubinage, and that their children are illegitimate. My Lords, the law may be so; there is every presumption that it must be so, because the law has been so declared by the unanimous opinion of my Lords the Queen's Judges. But still, it will be incumbent upon every noble Lord, who is called upon to give an opinion upon this important question, to act according to the conscientious opinion which he himself forms upon it.

Further consideration adjourned.

[592]

August 10, 1843.

* LORD BROUGHAM. — The opinion delivered by the Lord Chief Justice of the ^{Opinions of the} Lords. * 699
Common Pleas, on behalf of the Judges his learned brethren and himself, has received, as it well deserved, the greatest attention from your Lordships ; and it now remains that such of us as have made up our minds on the subject should express the sentiments which we entertain, after profiting by a deliberate consideration of the arguments used to explain and enforce the conclusion that the Judges have arrived at.

In discharging a duty which would be incomparably more easy and less ungrateful could I agree with those learned persons, I must be permitted, in the first place, to express my regret if the course taken by me, with, I believe, the general concurrence of your Lordships, of urging the giving an answer to our questions before this session should close, (a) shall be found to have occasioned the Judges any inconvenience, or precluded the fullest consideration of the important matters submitted to them.

I must be allowed to say how deeply I lament the peculiar form in which the assistance of the learned Judges has been tendered to us. The opinion purports to be unanimous ; but the more important matter of the reasons urged to support it would not seem to be thus represented. And although in ordinary circumstances this would be of little moment, in the present case there is a fact stated which gives it great importance indeed. Affirming the difficulty of the subject ; confessing “ that it is involved in still * deeper obscu- * 700
rity now than in former times, when one great authority declared that the law lay very loose regarding things naturally essential to marriage, and others expressed themselves with considerable uncertainty upon it ; ” the learned Judges “ acknowledge themselves unable to trace or define, with absolute certainty, the boundary of marriage itself ; ” that is, the whole

(a) His Lordship had on the 19th of June, immediately after the Judges delivered their opinions in the M’Naghten Case (*ante*, p. 200), expressed his earnest desire that, previously to leaving town for the circuits, they would lay before the House their answers to the questions proposed to them in the present case.

matter in dispute. Nor is this all. We are told that some of those learned persons, how many we are not told, at one time "felt considerable fluctuation and doubt," after the argument at our bar, and only "acceded to the opinion of the majority" upon grounds which are not given with a convenient, or indeed with any certainty; for it is distinctly stated that the Chief Justice alone is to be understood as giving the reasons for an opinion in which all concur, but concur upon various grounds, some of which, alone, it is probable, are laid before us; nay, none of which may very possibly be given.

Now, it is to be observed, that the opinions of the learned Judges are resorted to by your Lordships, not to decide the question before you, but to give you information, suggestions, and, generally speaking, assistance in forming your own. It therefore becomes necessary that their reasons should accompany those opinions, and accordingly they are, by the course of your Lordships' proceedings, and, indeed, by your orders, invariably required. If, indeed, any difference were to be made in the value which we attach to the opinions and to the reasons, we should certainly regard the reasons as the more valuable of the helps which we thus derive from those learned persons. Nothing, therefore, can be more a matter of regret than the circumstances to which I

have, in the outset of my argument, deemed it fitting
 * 701 that I should advert. * But, at the same time, that circumstance is so far a matter of gratulation to me, that it somewhat lessens the difficulties under which I labour in expressing an opinion at variance with theirs.

In approaching the very important question now before your Lordships, the first consideration that we find raised by the opinions of the learned Judges is, that they have declared all marriages void, and absolutely void, which are not solemnized by a clergyman or person in holy orders, in those parts of the British dominions to which the Marriage Act (26 Geo. 2) does not extend. Therefore, wherever the English law prevails, in all our numerous colonies to which no remedial Act has been applied, every marriage celebrated without a parson is void, and the issue are bastards. But this is not all; the same is equally true of all marriages contracted

by those persons in this country who are expressly exempted from the operation of Lord HARDWICKE's Act. Thus all marriages of Jews and Quakers before the legalizing Act of 1835-6 are absolutely void; and it follows that every Jew and every Quaker, the issue of such marriages, that is, every Jew and every Quaker now living and above eight years of age, is a bastard: and, furthermore, it is another consequence of this doctrine, that every pedigree, any link of which depends upon the legitimacy of any Quaker or any Jew; or any person born of a colonial marriage at which no priest assisted, becomes wholly imperfect, because no title can be made under it. Thus, if any purchase has been made, and a claim is preferred under it, and the title of the vendor has to be traced through any Jew or any Quaker, or any person the issue of a colonial marriage, the purchaser's title is gone, and none can * take or can hold under * 702 it, although the full consideration has been paid, and the title in all its other parts is complete. I am, of course, assuming that the flaw has not been removed by the lapse of time letting in the Statute of Limitations.

It is, no doubt, certainly true, that incorrect or even dangerous consequences furnish no argument against a proposition which is consistent with itself and with undeniable principle, and supported by unquestionable authority; but it is at least as certainly true, that when any proposition leads to perilous consequences, and when its practical enforcement would bring on such mischiefs, we are called upon to scrutinize the foundations on which it rests with a caution and a jealousy proportioned to the evils resulting from its adoption. We are bound only to admit it when we have no choice and no escape; when, pressed by arguments which the more we examine them appear the more irrefragable, the necessity of yielding is plain; when (all the reasons commanding our assent) nothing remains but to declare the law, and leave the remedy, whether by prospective or retrospective acts of power, to the lawgiver himself. The view of such consequences affords the best possible reason for being slow, and even reluctant, to yield our assent, and for admitting nothing without the closest scrutiny. I shall afterwards show that

those consequences of inconvenience or danger point in another way to a support of the doctrine encumbered by no such evils. Keeping, however, the considerations in view to which I have adverted, let us proceed to that examination which those considerations require to be most full and minute.

It is necessary to begin by inquiring what is really
 * 703 * meant by a contract of marriage, or the contracting of marriage within the limits and scope of the present argument. We clearly do not thereby intend a contract in the more ordinary sense, the more general acceptation of that word; we do not mean a contracting, an engaging, or bargaining to marry; such a contract is a mere article and condition of a marriage to be afterwards had; it is to this subsequent actual marriage that the term "contract" is applied in the present argument, and not to any mere mutual promise or engagement to marry; such promise or engagement is a promise or engagement to contract a marriage. Now, all admit, and the opinions of the learned Judges pronounce, the marriage contract thus designated to be one of a very peculiar kind; for whether it is to be regarded as *ipsum matrimonium* or not, they describe it as perfectly indissoluble; neither party can repudiate it or withdraw from it; neither party can release it; neither party can renounce for himself the stipulation, or let the other free from the obligation; both together are so absolutely bound that both together cannot put an end to the mutual obligation thus contracted towards each other.

Such being the nature of the contract, we first ask how it comes to be called by a name which, in all other cases, signifies something so entirely different? What other contract is unreleasable? What other has this perpetual and enduring force? The answer is plain: there is a contract, and a contract in the ordinary sense of the word; the parties contract to take each other for husband and wife, to live together as such, and to perform the duties of that relation. If they contract to marry at a future time, it is a common contract
 * 704 to do something hereafter; that something * is to contract a marriage, that is, to contract with each other to

live together as man and wife ; the former contract is executory and releasable and dissoluble by mutual consent ; the latter is executed, unreleasable, and indissoluble.

We next ask how such a contract as this can be said not to be perfect as soon as made, or to have any reference to the future, or to contemplate any further operation for its perfection, or to require any further act toward its completion ? How can it be made more lasting than by being perpetual ? How can it be made more firm than by being placed beyond the power of the parties and of all mankind ? How can it be made more binding than by being wholly indissoluble ? The imagination is lost in its endeavours to fancy any one attribute that can be added, any one quality that can make the nature of this contract more ample, or its obligations more stringent.

But we hear mention made of proceedings in the Ecclesiastical Courts to enforce a performance, as it is called, of this contract. Let us not be deceived and led away by sounds. No Court has now the jurisdiction to compel a performance of a marriage contract, if by that is meant to compel a marriage where parties have agreed, have mutually promised, to marry. At all times this contract was put an end to by a subsequent marriage of either party. Accordingly these Courts only interfere where the marriage contract has been *per verba de præsenti tempore* ; and the libel always pleads that fact as the foundation — the necessary foundation — of its demand to have a sentence requiring something further to be done. What is that something ? Do these Ecclesiastical Courts assume the power of compelling parties to do something more, * who had already contracted a mar- * 705

riage de præsenti ? In two respects they certainly used to do so ; in one of these respects they do so still, in the other they did so till prohibited by the legislature. They could compel the parties to perform the contract and fulfil their engagement of living together as man and wife, for they could give restitution of conjugal rights to the party complaining against the party refusing thus to perform his engagements, and this they still do ; but they could also do that which was certainly in its origin an usurpation, — they could

compel the parties, who had contracted the marriage civilly, to clothe their civil contract with religious ceremonies, by solemnizing, in the face of the church, a marriage contracted, that is, made without the intervention of the church or its ministers.

That this solemnization could add nothing to the force of the contract, or the rights of the parties under it, is clear ; because if it were necessary to perfect the contract, or to make those rights vest completely, we are left in total inability to conceive what the contract was during the interval between the making of it civilly and its alleged completion ecclesiastically. How could parties be bound indissolubly and perpetually, and yet be bound to do nothing ? How could such obligations and such stipulations possibly remain suspended, as regards all the things contracted to be done, and yet in full binding force as to the impossibility of the obligations being determined ? If the contract was indissoluble, it must be to do something ; it was utterly absurd to hold that the parties were indissolubly bound to do nothing.

But, if the only reasonable way of getting over this formidable difficulty be resorted to, if it be said that
 * 706 * the contract made without a priest is only a contract afterwards to make one with a priest, the answer is at hand, and it seems irrefragable. There is no difference whatever, not in a single iota, in the contract alleged to be imperfect and that alleged to be complete. A contract to sell an estate is executory, because it binds the party to do some ulterior and different act. A contract to marry afterwards is executory in like manner ; but a contract whereby parties take one another for husband and wife is only a contract to live as such, and it is identical with the same contract repeated before a priest, and with his aid. So, if I contract to sell an estate and refuse to do so, a Court of Equity will compel me, that is, will compel me to perform the special thing which I had engaged to do. When I contract to marry, neither a Court of Equity nor a Court Christian can compel me to perform by marrying ; when I contract a marriage, that is, contract to live as man with a wife, I may be compelled so to do ; but the Court might also, till the law

was changed, compel me to perform the same identical contract over again in another manner, not compelling me to do any thing different from that which I had already done, but only compelling me to clothe what I had done informally with proper formalities. The object of these formalities was something wholly foreign to the validity of the contract already executed, and had no force to improve its binding nature. It was to appease the conscience of parties who had neglected a religious observance; it was to give that which had been irregularly, though bindingly, done a regular form and aspect; it was to reconcile the parties with their clerical guides; it was also to maintain the authority of those guides; it was finally, peradventure * primarily, to * 707 augment the emoluments of those guides.

Although, in order the more effectually to keep possession of the authority over marriage which they thus grasped, the churchmen were sometimes inclined to treat the civil contract as void in some respects, yet they for the most part held it binding; but they endeavoured to accomplish the same purpose by holding in some instances that any subsequent marriage was only voidable and not void. They never seem to have denied the validity of the first in most respects: thus they admitted that whoever had contracted such merely civil or irregular marriage might cohabit without committing the sin of adultery; they always held that if either party cohabited with another person, the intercourse was adulterous. They never doubted that a second marriage contracted by either, standing the first, was unlawful; they only said it was voidable by suit in one of their own Courts, rather than null and void in itself. Now this distinction, clearly taken with the view of performing what is said to be the office of a good Judge, *ampliare jurisdictionem*, is plainly proof of the first marriage being valid, else why was the second to be declared void by sentence of any Court? The first might have been solemnized irregularly and without a priest, the second regularly and with a priest's intervention; yet the second was declared void by sentence of the Ecclesiastical Court, on the ground that the first marriage, though irregular and merely civil or lay, was yet valid, and had all the essentials

of a binding contract, a contract executed: on no other conceivable ground could the second marriage be declared unlawful and void, by any sentence of any Court.

It is, however, equally clear that this contract may
 * 708 * be entered into by the parties so as to be in some sort merely executory; they may marry civilly, with an intention that there shall afterwards be a religious ceremony or solemnization performed, — a regular marriage celebrated as it were in face of the church. Such a contract, the first made contract, being by consent of the parties made to depend for its validity on the subsequent religious solemnity, although it may still be indissoluble, may also be incomplete until the event contemplated occurs to give it perfection. Such a marriage may justly be termed imperfect, and only completed by the religious celebration. I beg the attention of your Lordships to this distinction, which the learned Judges appear to have overlooked; because I really venture to think it solves many of their doubts, and explains the cases on which they rely. Be it ever borne in mind that I do not say all marriages are valid where *verba de præsenti* are used. Those marriages only are so where the force and effect of the *verba de præsenti* are to bind the parties by this contract, without reference to or contemplation of any future ceremony. If the parties plainly contemplate a future solemnization, and only bind themselves in the event of that taking place, then their contract is executory and conditional, not executed and absolute. It is like a contract or agreement to grant a lease, which may, according to its frame and to the circumstances, be a lease or only an agreement, according as the words amount or not to a present demise.

These considerations may clear away the difficulties which have been conjured up to encumber the ground of this argument. For, in the first place, they furnish a decisive answer to the objection, which has weighed with many, that
 * 709 they who maintain the * validity of a marriage *per verba de præsenti* must allow the possibility of two valid marriages subsisting at one and the same time. Now this is manifestly impossible by the whole scope of our contention; for the first marriage being valid, we of course hold the second void; nay, it is voidable even by the opposite

argument. They also deny the validity of the first, only contending that the second cannot be set aside without a sentence. They admit the first to be valid, at least to the effect of precluding a subsequent marriage; we hold it absolutely valid, and the second absolutely void.

In the next place, the positions which have been laid down seem satisfactorily to explain some of the cases most chiefly relied on by those who support the judgment below, and mainly by the learned Judges in their argument. It is said, that if the marriage *per verba de præsenti* was complete without more, then the Court Christian would declare it to be so by its sentence, and require no further celebration: and the distinction is taken between a Scotch marriage, as in *Dalrymple v. Dalrymple*, (a) and a Sicilian one, as in *Herbert v. Herbert*. (b) In the former no further solemnization is ordered; in the latter "the contract is declared valid to all intents and purposes, and, therefore, the parties are decreed to solemnize it in the face of the church." But the Scotch marriage is decreed valid, and no additional celebration is added; because the only defect of an irregular marriage in Scotland is that it incurs the censures of the church, from which a celebration *in facie ecclesiæ* in England could not relieve the parties; and the secular marriage is not proved to be of more force and effect than a * similar marriage * 710 in this country, and therefore, the solemnization is ordered, as it would have been, before the Marriage Act, if the contract had been made in England.

The reason, and the manner of so ordering it, is clearly shown by the prayer of the libel, and the sentence as cited from the book of practice called "The Clerk's Instructor." (c) After setting forth a marriage *per verba de præsenti*, the libel asks for a decree that it is of full force and effect to all intents in law whatsoever; and it adds these words, "and also that the said A. B. may be compelled, constrained, and ordered to solemnize the said marriage in the face of the church;" and the sentence is accordingly. For when Sir GEO. LEE, in

(a) 1 Hagg. Cons. Rep. 54.

(b) 2 Hagg. Cons. Rep. 263; 3 Phill. 58.

(c) Page 313.

Baxter v. Buckley, (a) says, "I gave sentence for the contract," this is what he intends; and he adds, that he also enjoined Buckley to solemnize it in the church with Baxter within sixty days: there can be nothing stronger than the inference from this manner of pleading. Had the contract only been executory, and the marriage itself had consisted in the celebration *in facie ecclesiæ*, the libel would plead that, in respect of such contract, A. B. should be ordered to celebrate a marriage. But it says only, that "a true, pure, and lawful marriage had been contracted," and requires this to be declared: and "also that A. B. be ordered," not to celebrate a marriage, that is, a marriage not already had, but "to solemnize *in facie ecclesiæ* the said marriage," that is, the marriage already had, but not had *in facie ecclesiæ*.

I observe that the learned Judges, in endeavouring to evade the force of the decision in *Bunting v. Lepingwell*, (b)

* 711 *rely upon the words of the decree, "quod prædicta Agnes subiret matrimonium cum præfato Gulielmo." Clearly this is only the solemnization for order and regularity's sake. But I perceive much stress is laid upon the word "*fore*" as in the future tense; and it is contended, that the first imperfect marriage being only perfected by the solemnization ordered to be made, the second was adjudged to be void, or become so upon that solemnization being made. I apprehend this argument rests wholly upon a mistake of the plain grammatical construction of the words. The report in Lord COKE sets forth the special verdict, and gives the statement of the consistorial proceedings; "in which libel decretum fuit quod Agnes subiret matrimonium, et insuper decretum fuit dictum matrimonium;" that is, the second marriage "*fore nullum*;" that is, "in which libel it was decreed that Agnes should solemnize marriage; and moreover it was decreed that the said (that is the second) marriage should be null." This is only a tense used in consequence of the structure of the sentence, which has reference, for the reasons I have assigned, to the sentence declaring the second marriage void, and not any reference to the solemnization. Had the invalidity been

(a) Lee's Ecc. Cas. by Phill. 57.

(b) 4 Rep. 29; Moor, 169.

referred to the date of the solemnization, it would have been stated that "thereupon," or "thenceforth," or "thereafter" the second marriage should be held void; instead of this, the only word used is "*insuper*," moreover. Indeed, how could any such sentence, as is supposed, have been pronounced by rational men? The argument for the defendant in error assumes it to have been declared that the second marriage was only to be held void *after something sub- * 712 sequent, something posterior to its date, was done: in other words, A. imperfectly marries B., and then regularly marries C. *in facie ecclesiæ*; but the regular marriage is to be set aside by something which A. is to do after its celebration. It is to be set aside by matter *post*; and not only so, but it is to be declared, by reason of such matter *post*, to have been void *ab initio*. Was there ever yet an instance of a declaratory sentence proceeding upon any circumstances or facts whatsoever, other than those which existed at the date of the fact itself, whose validity or invalidity the sentence declares?

It is, however, said, that in this case the special verdict found only an executory contract; namely, a contract expecting and contemplating a future solemnization; in which case there was really no marriage at all *per verba de præsentī*, and Agnes might be held to be compellable to solemnize according to the contract. Again, if the second marriage was to stand until the first should be solemnized, the party solemnizing the first was guilty of bigamy; and the decree of the Court, in effect, ordered him to commit bigamy. This is the inevitable consequence of holding that the first is not perfected before solemnization, and that the second is not void, but only voidable, if its period of invalidity refers to the solemnization of the first contract. Yet the use of this argument, so full of absurdity, may not be quite optional to the defendant in error; he seems bound, by the whole nature of his contention, to employ it. If the first marriage is only executory, the second cannot be avoided until the first is completed.

The three older cases relied on by the learned Judges are, the one in Edward the 1st's time, mentioned by Lord

* 713 HALE in his manuscript notes, and * copied thence by Mr. Hargrave in his note ; (a) *Foxcroft's Case*, (b) and *Del Heith's Case*. (c) The first of these authorities is involved in considerable obscurity, especially as to the Court which reversed the judgment of the Common Pleas. That Court had held A. to be seised before his feoffment to D., and during his marriage *per verba de præsenti* with B., and had adjudged dower to the widow upon that seisin : thus holding the marriage good, upon the very solid ground that the sentence of a competent Court had decreed its validity. The reversal is said to be "*coram Rege et Concilio* ;" and the learned Judges state, from Lord HALE's book on the Lord's House, that this was a Court attended by the Chancellor, Treasurer, and Judges. Lord HALE describes it (d) as the King's "*concilium ordinarium* ;" and he says, none were members but those called thereto by the King. He then adds, that in ancient times all privy councillors were called to it, with the great officers of State, whom he enumerates as Chancellor, Treasurer, Steward, Admiral, Privy Seal, Chamberlain of the Household, Master of the Wardrobe, Comptroller of the Household, Chancellor of the Exchequer, and the Judges and Masters in Chancery. He adds, that in legal matters the Chancellor and Judges used to be called. It is evident, therefore, that we have no distinct conception of the constitution of this body as a regular Court ; and, what is of great importance to the present argument, I am not aware that any one of its decrees has ever before, on any occasion, been cited in any Court, either of law or equity.

But, again, let it be mentioned that the ground of
 * 714 * the decision is here said to be A.'s having had no seisin "during his espousals with B. ;" yet the phrase "espousals" is, strictly speaking, the term used for the *contractus sponsalibus* ; a mere contract to marry. Lord COKE defines *sponsalia* by *futurarum nuptiarum conventio et repositio* ; (e) and such strict meaning may very possibly be the

(a) Co. Litt. 33 a. [n. 203].

(b) Rog. Ecc. Law, 584 ; 1 Roll. Abr. 357.

(c) Rog. Ecc. Law, 584 ; Harl. MSS. 2117.

(d) Jurisd. Ho. Lo. 5.

(e) Co. Litt. 34 a.

one given in this very ancient case. Was A.'s seisin then disputed, and held disproved, even before he enfeoffed D.?

It is further to be observed, which may possibly explain this case, that originally dower was held to be dependent upon a public assignment of it; and, beside the common-law dower, there was one called either *ad ostium ecclesie* or *ex assensu patris*, which, however, implied the public assignment, and was only for the purpose of enabling a party to assign before the descent of the land was cast upon him. Therefore, Lord COKE says, in the same place, dower *ad ostium castri sive messuagii* is not good, it ought to be *ad ostium ecclesie sive monasterii*, for the law requires publicity and solemnity; and this agrees with Bracton (lib. 2, c. 39). Now we are told that this was anciently true of all dower, as well as of the two kinds *ad ostium* and *ex assensu*, and that in Henry the 3d's time a wife married *in camera* had it not. (a) And, among other reasons for this, we may well suppose one to have been that the feudal lord was entitled to a fine whensoever the vassal's wife was entitled to dower. For this, a sufficient security was afterwards supposed to be afforded in the public assignment during the widow's quarantine, or the forty days elapsing after the husband's decease. But, more anciently, the further security was taken of requiring * a publicity to the marriage which gave her a title to * 715 dower. This, therefore, would so far explain the reversal *coram Rege et Concilio*; and would only displace or supersede the reason given in the note, by another and a better one.

But if reliance be placed upon Lord HALE's authority, supposed to be given in his note to the MS. account of this case, surely much more weight must be ascribed to what he did and said judicially; and this appears to be somewhat at variance with the doctrine alleged to have received his countenance in the MS. note. We find Roger North, in the life of his brother the Lord Keeper, complaining of Lord HALE for his partiality to sectaries; and the ground of this charge is, that he allowed a special verdict to find a Quaker's marriage: which, says the

(a) Perk. § 306.

biographer, could not be good without the liturgy, and therefore this was an infraction of the Act of Uniformity. Lord HALE said, he was unwilling to hold the children bastards, and he thought that all marriages made according to the principles of men severally should be held good, and receive their effects in law. I cannot agree with the learned Judges that his allowing a special verdict, which referred the question to the Court, is a proof of his holding the opposite opinion; for you must take the proceeding of allowing the special verdict in connection with the *dictum* which accompanied it, and that was in favour of a marriage. There is, further, another note of Lord HALE, given by Mr. Hargrave in Coke Littleton, (a) in which he holds a gift to a wife married "*post affidationem et carnalem copulam* void," and, consequently, holds the marriage good.

* 716 * One thing, however, is admitted to have been held by this case cited from the MS. note, *tempore* Edw. 1. The marriage *in facie ecclesiæ* and by force of the Ecclesiastical Court's sentence, had no relation back; for it was not held to make the first marriage good *ab initio*, else it would have made A.'s seisin good before the feoffment to D., and standing that which had now become a perfect marriage with B. Yet the whole of the argument on the other side, upon *Bunting v. Lepingwell*, rests upon the effect of the subsequent solemnization of an imperfect contract, working by relation backwards the completion of that contract, and making it *ab initio* valid.

Another thing is also to be observed in this note, equally at variance with the argument of the learned Judges. B. recovered A. for her husband according to the note, and how? By sentence of the Ecclesiastical Court, and that sentence never was reversed. Here then was an end of the question of validity, for by that sentence *transit in rem judicatum* having been decreed by the proper authority.

Therefore this case, *tempore* Edw. 1, so much relied on by the learned Judges, is, when well considered, just as much in conflict with the argument of the defendant in error as with that of the plaintiff.

(a) 34 a, n. 209.

Of Foxcroft's and Del Heith's cases it may justly be said, that by proving too much, they prove nothing. According to the former, a marriage celebrated by the bishop of the diocese is void, merely because not celebrated in a church; and according to the latter case, a marriage celebrated by the parish priest is void for the same reason. Nor will it avail to say that such has long ceased to be the law. When did it cease? By what authority did it cease? When it *did cease, * 717 have we any ground for holding that the presence of any priest at all was retained as an essential part of the solemnity?

The same may be said of another and a still more ancient authority, relied on by the learned Judges; the *L. L. Edmundi*, published by the record commissioners. To make nuptials "binding to all prosperity, it is said there must be present a mass-priest." Now this excludes a deacon; yet who doubts the validity of deacon's orders for this purpose? I mean even according to the contention that requires sacerdotal presence and aid.

But the case mainly relied on, of *Haydon v. Gould*, (a) receives illustration from the same argument. That was a marriage of two persons of the Sabbatarian sect according to their own forms, and no priest or deacon being present. The wife died, and the husband claimed administration, which was refused. The delegates, on appeal, affirmed the sentence. The ground, however, of the decision is distinctly stated to be, that when the husband claims a right under the ecclesiastical law, he must prove himself to be a husband according to that law; that is, in the manner which the ecclesiastical law approves. It is added that the wife, who is the weaker sex, and the child of such marriage which was in no fault, might have had administration, but not the husband who was in fault; he is treated as a wrong-doer, and as a matter of discipline the Court Christian will not countenance his conduct in contracting an irregular marriage, by suffering him to take a benefit under it conferred at their hands. This is the view of the case taken by a very high authority, Lord Chief Baron

(a) 1 Salk. 119.

COMYN. (a) Nor should it be forgotten that one part
 * 718 of the case clearly * proves too much, for it holds the
 plea in the Ecclesiastical Courts to be of a marriage
 “*per presbyterum sacris ordinibus constitutum*,” which would
 exclude a deacon ; and yet it is on all hands agreed, as I have
 before said, that whatever a priest can do in this respect, a
 deacon may do as validly.

I have mentioned the view taken by Chief Baron COMYN, in
 his Digest, as being in accordance with my argument ; but he
 also sat in judgment himself upon a case in which this ques-
 tion arose, and he then concurred in a judgment to the same
 effect. *Fitzmaurice v. Fitzmaurice*, in 1732, came before the
 delegates, of whom the Chief Baron was one. It was the case
 of a marriage *per verba de præsenti* ; the Court held it valid,
 and the Lord Chancellor refused a commission of review. Sir
 W. SCOTT cites it with great respect in *Dalrymple v. Dalrym-*
ple, (b) from a note furnished him by Dr. Swabey. Lastly,
 we must bear in mind, that before the Statute of Distribu-
 tions, the Ecclesiastical Courts gave or refused administration
 at pleasure ; and this case of *Haydon v. Gould* occurred not
 very many years after that statute came in force, and before
 the new and strict rules as to granting administration were
 in use.

We now approach authorities not exposed to any such
 objections. But before I come to these I wish to state what
 appears to me the result of the whole, both as affirmed by
 text-writers, and as laid down by the decisions of the Courts.
 With this statement I should have begun, had not my un-
 feigned respect for the learned Judges made me anxious, in
 the first instance, to deal with the cases upon which they have
 relied, and thus clear the ground for my argument.

* 719 * The Roman or civil law is the foundation of the
 personal law of Europe, and the inroads of the feudal
 law upon that symmetrical and finished system have been
 chiefly confined to the rights connected with the enjoyment
 and transfer of real property, between which and personal
 estate the more ancient law made no distinction. The canon

(a) Com. Dig. tit. Baron & Feme, B. 1.

(b) 1 Hagg. Cons. Rep. 69.

law regulating the Ecclesiastical Courts, which early assumed to dispose of questions relating to marriage, to the proof of wills of personal estate, and to the appointment of administrators in cases of intestacy, is most especially drawn from the fountains of the civil law. This law is its foundation ; the additions or superstructure were made by the decretals of the popes and the councils, which had succeeded both to the emperors and to the apostles, perhaps more clearly to the emperors than to the apostles, and which especially governed the body of the church. Now, by the civil law, and by the earlier ecclesiastical law, — indeed by that law until the 16th century, — marriage was a mere consensual contract, only differing from other contracts of this class in being indissoluble even by the consent of the contracting parties. It was always deemed to be a contract executed without any part performance ; so that the maxim was undisputed, and it was peremptory, “*Consensus, non concubitus, facit nuptias vel matrimonium.*”

Now, it is clear that, by the universal law of Europe before the Council of Trent, this contract could be validly solemnized by the parties consenting to take each other for man and wife, without the interposition of the sacerdotal office, or the presence of any one in holy orders. The church was always anxious to interfere, to require the benediction of a priest and even the performance of mass, and to discountenance, * as far as possible, any marriage not so * 720 solemnized ; but in a matter so interesting to mankind, and in which their strongest feelings were embarked, the clergy in vain attempted to obtain the ascendant they sought ; and it was only by the decree of the Council of Trent that the sacerdotal institution became essential to the validity of the nuptial contract. This clearly appears from the Decretals, book 4, where it is laid down that a man and woman legally competent to contract matrimony shall take each other for husband and wife *per verba de præsenti tempore*, without more ; that they are thereby bound as such, and that if either party contract a second marriage, living the other, it is void, and the parties to the first contract may be compelled to cohabit. In consequence of what has been said respecting the

Council of Winchester in 1076, I shall now read the words of Pope Gregory IX.'s decree, 150 years after that Council: "Si inter virum et mulierum legitimus consensus interveniat de præsentì, ita quod unus alterum consensu verbis consuetis expresso recipiat, utroque dicente, Ego te in meam accipio, et Ego te in meum, vel alia verba consensum exprimentia de præsentì, sive sit juramentum interpositum, sive non, non liceat alteri ad alia vota transire; quod si fecerit secundum matrimonium de facto contractum, etiamsi sit carnalis copula subsequuta, separari debet, et primum in suâ firmitate manere." (a) This is what I have already stated as the limit of the Ecclesiastical Court's power in regard to compelling performance: it assumes the marriage to be perfect, and decrees performance of its obligations. The oldest and most venerable authorities agree in giving this account

* 721 of the matter in *express terms: Sanctius De Matrimoniiis affirms the validity of a marriage without a priest, before the Council of Trent. De Burgh, in his book written at the end of the fourteenth century, and called *Pupilla Oculi*, expressly says, treating "De sacramento matrimonii;" "Patet quod ad collationem hujusce sacramenti non requiritur ministerium sacerdotis:" and he afterwards goes on to say, that neither the sacerdotal benediction nor any other prayers pronounced by the priest are "forma sacramenti, nec de ejus essentia, sed quoddam sacramentale ad ornatum pertinens sacramenti." He had before said that the parties could mutually administer this sacrament to each other, or either to him or her self; and that no minister was required for its administration other than the parties themselves; "non requiritur alius minister distinctus ab ipsis contrahentibus." Words cannot be more distinct than these.

The Council of Trent required, and for the first time required, the marriage to be in the presence of a priest. But of what priest? Of the parish priest. The Council of Trent never was received or acknowledged in England; of which we may at once see the proof in this, that there we have no pretence ever set up, nor any contention, that the parish

(a) Decretal, lib. 10, pl. 1, c. 81.

priest's presence is necessary. But if the Council of Trent never was recognized in England, have we not a right to fall back upon the common and universal law of Europe, as our own in this important matter? Now, that decree is itself the most irrefragable proof of this; for it begins by declaring all past marriages valid without any sacerdotal interposition; and consequently pronounces that the requiring a priest's presence is prospective merely, and an alteration of the former law.

* I next have to observe, that nothing can be more * 722 improbable than the existence of one law for all Christian Europe, and another for England on this important head. All Europe, including England, lived under the same religion, under the same ecclesiastical system, under the same spiritual rule. The presumption is, that the English law touching marriage is the same with the general law of Catholic Europe; and this presumption can only be rebutted by distinct proof that England has receded from that law, and made her own an exception to its tenor. I am entitled to lay this down upon general principles, but I have also the venerated authority of Sir W. Scott, who, in the case of *Dalrymple v. Dalrymple*, distinctly states, that the general law of Christian Europe touching the marriage contract must be taken to be the law of Scotland, unless it be shown "that the Scotch law has actually resiled from it." (a) "Show the variation," says the very learned Judge, "and the Court must follow it; but if none is shown, then must the Court lean upon the doctrine of the ancient general law." (b)

If any difference were to be made between the general continental and our insular law, it would be that sacerdotal intervention would be less requisite here than abroad, especially after the Reformation; for on the Continent, that is, in all Catholic countries, marriage is deemed to be a sacrament: with us it is not. Sacraments do not, indeed, necessarily require a priest, as baptism has been solemnly decided, in a late case before the Privy Council, to be valid without one;

(a) 1 Hagg. Cons. Rep. 103.

(b) 1 Hagg. Cons. Rep. 81.

but where a rite is sacramental, it may, *in dubio*, be
 * 723 more easily presumed to require the priest's * ministry
 than where the rite is not a sacrament at all. The
 probability, then, being that our law is the same with the
 foreign, it requires clear proof to show that England had a
 marriage law peculiar to herself. Have we any such proof?

The first thing that strikes us on this cardinal point of the
 cause is, that one of the authorities cited, John de Burgh, as
 laying down most distinctly that consent of parties is enough
 without a priest, and that a priest's intervention is only as to
 the clothing or ornament of the proceeding, and not essential,
 is an English divine. He was high, too, in our church, and
 he was Vice-Chancellor of the University of Cambridge.

But a better known and more venerable text-writer, Brac-
 ton, (a) gives, though more generally, a similar account of
 the contract, and he distinctly lays it down, that after a mar-
 riage, *per verba de præsenti* any feoffment or gift by the baron
 to the feme is void; therefore he clearly holds such a mar-
 riage to be valid and perfect. So, in treating of the legitimacy
 of issue, he pronounces the issue legitimate "*quem justæ
 nuptiæ demonstrant*," and he then enumerates the several
 kinds of *justæ nuptiæ*; saying that the marriage is complete,
 that is, the *nuptiæ* are *justæ*, whether public or clandestine,
 and whether *per verba de præsenti* or *de futuro*, so it be indis-
 soluble; the marriage *per verba de futuro* requiring of course
 consummation or part performance, to perfect such an ex-
 ecutory contract. What he says of dower has regard
 apparently to the assignment of it *ad ostium ecclesiæ*. Where-
 ever the legitimacy of issue is mentioned, the marriage *per
 verba de præsenti*, or *per verba de futuro cum copula*,
 * 724 * is given as sufficient, and no mention is ever made of
 the *benedictio sacerdotalis* as essential. However, the
 first case which I shall cite solves this question of dower, and
 shows that, whatever may have been holden in more ancient
 times, dower at common law was in all the more recent de-
 cisions held to accrue on marriage, though not *in facie
 ecclesiæ*.

(a) 4, 8, 303; 9, 304; 5, 420.

I observe that the learned Judges cite the authority of Archbishop Lanfranc's Council, holden at Winchester, in William the Conqueror's time, A.D. 1076, and given in Wilkins's Concilia. It is said to hold a marriage illegitimate which was unaccompanied with the benediction of a priest; but I have cited the higher authority of the Decretals, book 4. Would Archbishop Lanfranc himself have denied that Pope Gregory IX. had authority to overrule him? Yet his Decretal, which I have already cited, was promulgated 150 years after Lanfranc's Council. The whole canon law was not certainly received in England, but in Catholic times our Ecclesiastical Courts assuredly were bound by the Decretals; and the case *temp. Edw. 1*, cited from Hale, shows this plainly, for there the spiritual Court decreed the marriage without a priest to be good.

In looking to the authority of decided cases, I need not go back further than *Wickham v. Enfield*. (a) There, on a writ of assignment of dower at common law, a plea was pleaded of *ne unques accouple*, precisely as in the well-known case nearer our own times of *Ilderton v. Ilderton*. (b) In the latter there could be no sending to the bishop, because the demandant had replied a marriage in Scotland; in *Wickham v. Enfield* the replication merely took issue on *ne unques * accouple*, and a writ went to the bishop, who * 725 certified that the parties were coupled *in vero matrimonio sed clandestino*, and had cohabited till the death of the husband. Judgment having been given for the demandant and error brought, one error assigned was that the answer of the bishop was not in the affirmative to the writ; namely, that the parties had been coupled in legal matrimony; but the Court held *verum matrimonium sed clandestinum* as good as *legitimum matrimonium*, and the judgment of the Common Pleas was affirmed.

The case of *Collins v. Jessot* (c) is of great importance, because it gives Lord HOLT's clear and unhesitating opinion, in which the whole Court concurred, that a contract *per verba*

(a) Cro. Car. 351.

(b) 2 H. Bl. 145.

(c) 6 Mod. 155; 2 Salk. 437, *nom. Jesson v. Collins*.

de præsenti amounts to an actual marriage, and as much a marriage in the sight of God as if it had been *in facie ecclesiæ*; with this difference, that cohabitation before the religious solemnity is punishable by ecclesiastical censures. I do not at all understand the doubt cast upon this case by the learned Judges; they say, "If by the terms *ipsum matrimonium*, Lord HOLT intended to lay down the position that it was so held by the common law of the land." Now, his words are, "actual marriage, and as much so as if *in facie ecclesiæ*." But, say the Judges, he may have meant only a marriage by the canon law; to which I make two answers: first, that the canon law in his time, if by that he meant the law of the Catholic church, had, by the Council of Trent, required the presence of the parish priest; but if it be said that was not received here, then I answer, secondly, that Lord HOLT expressly excludes the supposition of the learned Judges as to his * 726 meaning, * by the distinction which he explicitly takes; namely, admitting that a cohabiting before solemnization *in facie ecclesiæ* exposed the parties to church censure: so that, instead of asserting the validity by the canon law, he would rather seem to admit that the validity was questionable by that law.

I cannot avoid here observing, that there is no statement by the learned Judges that this important opinion of Lord HOLT was also the opinion of the whole Court, until they come to speak of Sir W. SCOTT's mention of it: yet it was the opinion of the whole Court, Mr. Justice POWELL differing only on another point; namely, that a contract *per verba de futuro* prevents the parties contracting another and a subsequent marriage. On the main body of the Lord Chief Justice's opinion, Mr. Justice POWELL, as well as the others, Mr. Justice POWYS and Mr. Justice GOULD, agreed with his Lordship. It is, therefore, an opinion of the greatest weight; and as for the observation of the learned Judges, that the case before the Court might have been decided without raising that question, I would respectfully pray your Lordships and the learned Judges to reflect how far such an argument will go in impeachment of decided cases, when we consider how vast a bulk of the law now received as decided by the

Courts of Westminster Hall rests upon the resolutions of the Judges on points not strictly necessary to the decision of the questions before them.

The argument raised by the learned Judges in *Wigmore's Case*, (a) to show that in *Collins v. Jessot* Lord Holt had spoken only with reference to the canon law, does not appear to me at all maintainable; * for though he there * 727 speaks of the canon law, yet he adds the words (cited from his own reports), that the "law of man ordains marriages to be made by a priest, yet only makes them irregular, and not void, if made without one;" although he certainly holds that dower depends on the religious solemnity, probably referring to what the books say of dower *ad ostium*. But the learned Judges seem wholly to omit in their consideration the force and effect of *Wigmore's Case* upon the argument at the bar. That case was of a prohibition; the spiritual Court was proceeding to punish a party for fornication, on account of a cohabitation after a marriage by an Anabaptist minister, a layman, and the Court did prohibit, manifestly on the ground of the marriage not requiring a priest of the church. In the former case of *Collins v. Jessot* the Court of King's Bench had held that by church censures the parties might be punished, because it was a breach of order, ecclesiastical order, like the mere fact of celebrating a clandestine marriage, which we know in Scotland exposes the parties to church censures, though the contract is valid to all civil purposes.

I may here take notice of that class of cases in which marriage celebrated by a Roman Catholic priest has been held clearly valid by our Courts. *Regina v. Fielding*, (b) *Rex v. Brampton*, (c) *Latour v. Teasdale*. (d) Now, if marriage requires a person in orders to constitute its validity, I would respectfully venture to ask how he is the more in orders with us for his being a Roman Catholic priest? It is true that our church recognizes the Roman Catholic ordination in the case of persons who have renounced the errors of popery * and become members of our national church; and * 728 this on account of the apostolic succession. But does

(a) 2 Salk. 438.

(b) 14 St. Tr. 1327.

(c) 10 East, 282.

(d) 8 Taunt. 830.

it recognize such orders in Roman Catholics continuing such? Would not such a priest be punishable were he to administer the sacrament in any of our churches, as much if he did it according to our own ceremonial as if he said high mass according to his own? Is he in any one particular recognized as a person in orders while he remains a Roman Catholic? Though on this subject I would be understood to speak with the hesitation which is becoming on such a subject, yet I must add that I have in vain endeavoured to find any one instance in which the recognition of the orders does not depend on the party's recanting. I see also the consequence of holding that Roman Catholic orders are valid to any civil or ecclesiastical purpose while the party ordained continues a Roman Catholic; and surely no one will contend that if an act is done by a Roman Catholic priest before his recantation of popish errors, his subsequent recantation can operate by relation backwards to give the intermediate act validity. I cannot, therefore, suppose it possible that, in those cases to which reference has been made, the contract *per verba de præsenti* was held to be *ipsum matrimonium* on the ground of a Roman Catholic priest being present; they must be taken as decisions that the contract without any person in holy orders is an actual marriage. One of them, indeed, *Rex v. Brampton*, expresses Lord ELLENBOROUGH's opinion very clearly, that, before the Marriage Act of 1753, such a contract was valid. That Lord KENYON held the same opinion is plain enough from what he said in *Reid v. Passer*, (a)

* 729 although he says he speaks not so * as to be bound by the *dictum*. But this is no more than the caution which any discreet Judge would use in dealing with a proposition of such importance at *Nisi Prius*. In *Latour v. Teasdale*, Chief Justice GIBBS held the same doctrine explicitly, and without any qualification, the case being in banc.

But these decisions, say the learned Judges, are rested expressly on the authority of Sir W. SCOTT; and Sir W. SCOTT, they add, cites the *dictum* of Lord HOLT. Surely it is so; but does that detract from the weight of either Lord

(a) Peake, N. P. Cas. 808.

HOLT's *dictum*, that is, the *dictum* of the whole four Judges of the King's Bench, or Sir W. SCOTT's decision and argument? Very far from it; it only furnishes an additional reason for being extremely cautious how we set aside those older authorities, and break in upon the principles which they establish, which subsequent decisions have adopted, which succeeding Judges have followed, and which until the present time have never been impeached.

I now come, therefore, to the only two of these great cases not yet discussed, and they are all the more important that they are decisions in the forum proper to such questions; namely, the Courts Christian. *Lindo v. Belisario*, in 1795, (a) came first before Sir W. SCOTT, then by appeal before Sir WILLIAM WYNNE, and it raised the point directly of the validity of a Jewish marriage. The marriage was held invalid, a minute examination of the contract proving, by reference to the Jewish authorities and the rabbis, that the ceremony performed did not amount to a matrimonial contract, but only to a betrothment. The ceremony consisted of the taking of a ring by the woman, after saying that she admitted her knowledge * that by the taking * 730 it she became the man's wife: all that the man did was to ask her that question, and put on her finger the ring, repeating Hebrew words, which mean not any consent of his, but only an address to the woman that she shall be holy to him according to the law of Moses. But it was proved that a formal contract in writing, signed by the man, was required to be delivered by him to the woman, according to the Jewish customs, before the marriage took place: thus, there wanted *verba de præsenti* certainly on the man's part, possibly on both his and the woman's part; but there also was this radical defect, that if these words had been used, and only meant a betrothment, expecting a further ceremony to make them a marriage, the words, though used, would have had no real meaning as *verba de præsenti*, and the whole proceeding would have been executory merely, according to the distinction which I set out with taking. The importance of the case, however,

(a) 1 Hagg. Cons. Rep. 216.

is this: not an attempt was made, even at the bar, to impugn this alleged marriage on the ground of a priest not having been present, and the Court, after full argument and in much doubt, directed questions to be put to learned men: all which argument would have been unnecessary, all which doubt would have been removed, all which questions would have been wholly superfluous had the doctrine of the learned Judges in the present case and the contention of the defendant in error been well grounded; for the want of a person in orders was undeniable, unless, indeed, those who hold an unconverted Roman Catholic to be in Protestant orders, also proceed to take another step in the same direction, and hold that a Jewish rabbi is a Christian priest. The argument

of Sir W. Scott distinctly lays it down, that in the
 * 731 Christian * church a contract *per verba de præsenti* is a perfect contract of marriage, though the canon law required subsequent celebration; (a) and referring to the Scotch marriage law, he says (b) that the rule prevailed both in Scotland and in this country until other civil regulations in England interfered with it, plainly referring to Lord HARDWICKE'S Marriage Act.

The doctrine thus laid down by that great Judge in 1795, and not departed from by the Court of Arches, I may say, the doctrine assumed to be irrefragable by both the parties and the Judges throughout the whole of this case, was never disputed during the period which has elapsed from that day to the present, a period of nearly half a century; but it received a remarkable confirmation in the more celebrated case of *Dalrymple v. Dalrymple*, to which I must now beseech the best attention of your Lordships. The question there was, whether a marriage was valid alleged to have been had in Scotland; and the whole turned upon what was the Scotch law; the *lex loci*, which it was admitted must entirely govern the consideration of the case. The argument both in the Court below and before the delegates, where I was of counsel with the respondent, was most full and elaborate, bearing a just proportion to the importance

(a) 1 Hagg. Cons. Rep. 242.

(b) 1 Hagg. Cons. Rep. 232.

of the case, which involved the *status* of the heir presumptive to high honours and ample estates, and involved also the consideration of great principles of law. The judgment in the delegates was a simple affirmance, according to the custom of a Court which was never wont to give reasons for its decrees ; but I will venture to assert that no one of the many advocates * who argued it ever thought of * 732 disputing the doctrine laid down by the Court below, in point of law ; all confining themselves to canvassing the decision upon the fact of what the Scotch law was proved to have been by the evidence in the cause. In this assertion I am borne out by the learned Judge of the Court of Admiralty, with whom I have consulted fully on the whole subject ; he was also of counsel in the cause. This memorable judgment, therefore, remains undisputed to this hour ; and it is only bestowing upon its merits at once the most just and the highest praise to say that it excels all the other performances of its eminent author, whether we regard the clearness of its positions, the close texture of its reasonings, the singular felicity of its diction, or the careful avoiding of all superfluous argument ; all extrajudicial discussion. But in weighing its authority, let us rather remark that it was most minutely considered and elaborately prepared ; and I will add, from the direct authority of the learned counsel who reported the case, that every line was submitted to Sir W. Scott, and every line received his correction and approval. In the whole compass of our books there is not to be found a decision more deliberately pronounced, or a judicial argument more carefully stated. In their whole compass is no report to be found more authentic in its statements of what fell from the Court.

Sir WILLIAM SCOTT lays it clearly down, that until the Marriage Act, which, according to Mr. Justice BLACKSTONE, was “an innovation on our laws and constitution,” the English law, agreeing with that of all Europe, held a marriage *per verba de præsenti* valid without the intervention of a priest ; and he cites the cases of *Collins v. Jessot*, *Bunting v. Lepingwell*, and * *Wigmore*, in proof that his doctrine * 733 is that of the Common Law Courts, as he distinctly

and authoritatively states it to be the doctrine of the Courts Christian. To suppose that he was ignorant of the case of *Haydon v. Gould* would be absurd, considering that it was decided in the delegates, that he quotes from the book in which *Haydon v. Gould* is reported, and that this case regarded a matter strictly of ecclesiastical cognizance; the granting of administration. But he does state the case of *Fitzmaurice v. Fitzmaurice*, which was also before the delegates, and to which I have already referred. His observation respecting the Ecclesiastical Courts is, however, very material; for, as if it was more clear there than at common law, he adds, after citing *Wigmore's Case*, "in the Ecclesiastical Court the stream ran uninterruptedly in that course." He also in terms negatives the position that marriage, because it was a sacrament in the Romish church, therefore required to be celebrated by a clerk; and declares that until the Council of Trent altered the law of the church, this sacrament could validly be celebrated by laymen all over Europe, as even after that Council it continued lawfully to be celebrated in England, notwithstanding the decree of the Council, which in England never was recognized; and I may state that in the Judicial Committee it has been held, after the fullest consideration, that any lay person, without a priest present, may administer baptism, which is a sacrament of our church, using the form of words, "I baptize thee, in the name of the Father, Son, and Holy Ghost." Now, it is said in the argument at the bar, and I am somewhat surprised to see the observation countenanced by the learned Judges, that these

dicta, as they are termed, of this great Judge, are * 734 extrajudicial. Were they mere *dicta*, and * were they

wholly extrajudicial, I have yet to learn that, proceeding from such a quarter, they are not entitled to unbounded respect. No Judge was ever less prone to travel out of the case before him; I speak from experience of that learned Judge, not only having argued many cases before the delegates arising out of his decisions, but also having practised for a long course of years before himself and Sir WILLIAM GRANT at the Privy Council: none ever abstained more scrupulously from ventilating opinions uncalled for, none

ever was more cautious in delivering his sentiments on important points. To suppose that he would have needlessly gone out of his way rashly to declare all marriages before the Marriage Act valid without any clerical solemnity, rashly to declare that all marriages now since the Act are valid in the colonies without any such solemnity, rashly to declare that all Quaker marriages and all Jewish marriages are at this day valid; that this cautious Judge, so wedded to the doctrines of the church, so jealous of any infringement of her prerogatives, so averse to any interference with her authority, should have needlessly volunteered such opinions as these in derogation of her prerogatives, or have stated them unless upon mature deliberation he had held them absolutely clear and free from all doubt, is one of the most extravagant suppositions which man can make, and proceeds from a profound and gross ignorance of Sir W. Scott's judicial character and whole habits. That he should on such ground ventilate needless and extraneous *dicta*, seems hardly credible; but if what he said on such matters be extrajudicial, it is only a stronger demonstration that he held the opinions thus volunteered to be perfectly free from all possibility of doubt, and was intimately convinced that in thus

* needlessly stating them he moved no landmarks, * 735 brought nothing that was fixed into any doubt, laid down nothing that could impugn any fully established doctrine.

But, with very great submission, I do most distinctly deny that the doctrine of Sir W. Scott was a mere *dictum* and extrajudicial. The point he was proving, the point on which the whole case hinged, was the Scotch law of marriage. He undertakes to show that this is in favour of marriage *per verba de presenti*, and he accomplishes his purpose by showing that the general law of Europe, including England, is in its favour; and that, therefore, it must be taken to be the law of Scotland, unless and until Scotland be shown to have excepted herself from that law by special provisions of her own. The question being, is it the Scotch law? he argues that it is the Scotch law, because it is the European law. Had England been an exception, that argument would have failed,

because it would then have been said, the law in question is not the general law ; for instance, it is not the English law. He shows that England is no exception, and that therefore it is the general law, and therefore it is the law of Scotland ; and therefore the marriage in judgment before him is good. Nothing can be conceived more close than this reasoning, nothing more solid than the connection between the conclusion and its premises. That conclusion is the decision of the question before him ; these premises are the English marriage law.

Thus far the decisions and authorities of the English Ecclesiastical Courts ; and it must be observed that they furnish a complete answer to the argument which I know has weighed with some in considering the case ; namely, that any
 * 786 question of marriage before * Lord HARDWICKE's Act, *per verba de præsenti*, without a priest, arising in a Court of Law, would have been referred to the Ecclesiastical Courts, and that those would have certified against its validity. Most clearly they would not so have certified, if they decided according to the ecclesiastical law, as Sir W. SCOTT and his brethren the civilians understood it. I have shown that Sir W. SCOTT and his brethren considered the point as more clear by their law than it is by ours, because Sir W. SCOTT said that their law on this question had always flowed in a clear and unbroken stream. Therefore they must have certified in favour of the marriage, and to assume the contrary is a *petitio principii*.

But it is not merely on decisions and *dicta* in those Courts Christian that the question turns. Consider the case of Jewish and Quaker marriages. It is quite manifest that the validity of these is quite irreconcilable with the opinion of the learned Judges in the present case ; yet not only are they apparently assumed to be valid by the provisions of the Act (26 Geo. 2, c. 33, § 18), but we have the authority of the cases decided on the point ; as the one cited by Mr. Justice WILLES, in *Harford v. Morris*, (a) of an action of criminal conversation by a Quaker, and the objection taken and the

(a) 1 Hagg. Cons. Rep. App. 7.

point argued that the marriage was not good for want of a clergyman; but this was overruled, and the plaintiff recovered a verdict.

There is, however, a much more material fact on this head: the number of persons belonging to the Society of Friends and to the Jewish persuasion who have obtained administration from the Ecclesiastical * Court, and ob- * 787 tained it without a struggle. I might, indeed, add the number of cases in which titles must have been made and deduced through the issue of Quaker and Jewish marriages; nay, the number of cases of persons who, born of such marriages, have been allowed quietly to take estates, real and personal, without any relative claiming or thinking of claiming to their exclusion; and also the numberless instances in which the Crown would have been entitled; no claim having, however, been made in any one instance by any one Attorney-General. Were the doctrine of the learned Judges well founded, not a single Jew or Quaker could have departed this life without an inquisition of office, and a finding to entitle the Crown; but so entirely was the law concealed from all former times, that no instance has ever occurred of any such attempt being made.

Finally, the law as laid down in 1811 by the Consistory Court of London, and confirmed in 1814 by the delegates, has ever since been acknowledged as the governing rule on this most important question; that decision only repeating more explicitly what the same learned Judge had pronounced more succinctly, but as distinctly, in 1795. For near half a century, therefore, it has been held as established and settled law in England; and not only have the other Courts decided other cases upon its authority, never questioned by them; not only must the discovery of the present day be held to subvert those other decisions, and to hold that they were all wrongly pronounced; not only have all the learned civilians been so assuming the laws, and so advising their clients uniformly, until the present opinion respecting Sir W. Scott's decisions carried consternation into the vicinity of St. Paul's; but marriages innumerable have been contracted * both by sectarians in this country, and by * 788

persons of all descriptions in our vast possessions beyond the seas, possessions on which the sun never sets, all of which are now found out to be void, all these parties fornicators and concubines, all their issue bastards. Into the sad details of such a subject I will not enter; from so painful a prospect I will avert my eyes. But this I must add before I leave it, that every Quaker and every Jew born of a marriage had before the year 1835, is by the learned Judges pronounced to be a bastard; the mother of each and every of these to be living in concubinage; every married pair of these sects may separate, and marry again without committing a felony; and every title to an estate, wheresoever situated out of Scotland, that is traced through a pedigree any link of which is a Quaker or a Jewish heir, must be shaken to its foundation, unless propped up by the Statute of Limitations and the lapse of long time.

The Marriage Act, in exempting those marriages and the marriages beyond seas from its operation, seems to assume their previous validity, and therein to assume the universal validity of lay marriages before it was passed; but this inference the Judges will not suffer to be drawn, and they declare all such marriages void by the effect of their doctrine. It is in vain for these learned persons to seek an escape from this conclusion, so far as it affects the Jews, by setting up the notion, destitute of all warrant from analogy, and repugnant to every principle of law, that the Jews are *quasi* foreigners, and that therefore they are a law unto themselves. The Jews are no more foreigners than we ourselves, or the learned Judges are foreigners; and if they were, their laws and their

usages could no more exempt them from the operation
 * 739 * of our law than any admitted foreigner could be suffered in England to set up a marriage void by our law, as good by the foreign law of the country he belonged to. Not to mention, that even were we to admit their doctrine as to the Jews, the Quaker marriages would remain annulled; and that is quite enough for my argument.

Surely it required such a doctrine to be not only reasonably clear, but to be free from all possibility of doubt, to warrant the authoritative promulgation of it in this place by such

venerable authority. Surely nothing can justify the giving vent to a proposition of law so frightful in its consequences, if it is encumbered by any difficulty, if it is confessed to be "involved in much obscurity," if those who have discovered it are obliged to allow that they have only been able faintly to descry it through a "still deeper obscurity" than veiled it "from the eyes of their predecessors," and to acknowledge that its form and proportions are so ill defined in the darkness which shrouds it, that they feel "unable to trace out and define its boundaries."

In other cases, where a grave doubt has long prevailed on any matter of law, even where an admitted error had crept into the decisions of Courts and the proceedings of practitioners, the safer course has been held, when that error was discovered, to abide by it, and not to revert to the sounder principle which it is admitted should never have been departed from. I remember, when I sat on that woolsack, a case occurred which was eminently calculated to illustrate this wholesome, judicious, and humane course of decision. For a long period of time the maxim had prevailed, that in point of law a real estate could be tied up by a strict settlement for the duration of the lives in being, and for * twenty-one years longer. The origin of the error, * 740 for it clearly was an error, was this, that in point of fact a fine never could be levied to bar the issue in tail, or a common recovery suffered to bar the remainders over, until the son of the last tenant for life was of age. Now, when the matter came to be questioned in the case of *Cadell v. Palmer* (a) before me here, in 1833, when I had the assistance of the learned Judges, we all were agreed that the doctrine of adding twenty-one years, as a term in gross, to the duration of the existing lives, was a mere mistake, and the more clearly a mistake because we so plainly saw how it had arisen; yet we all agreed that after the Courts had so long acted upon it, and the conveyancers had so long proceeded upon the assumption, reverting to the true principle would be most pernicious, and would shake the titles to many estates

(a) *Ante*, Vol. I., p. 372.

all over the country. I make bold to think that a shock given to all the titles in England would not have been more fatal to the peace and happiness of society, than the shock which disturbs numberless families, affects the character of parents, and deals out to their progeny the portion and the name of bastard, besides shaking also an almost equal number of titles to real estates.

Human legislation is exposed, is necessarily liable, to three great imperfections: the lawgiver cannot foresee and provide for all possible cases; his provisions may in their application become inoperative or frustrated by the destructive operations of time, the powerful and sleepless enemy of all human works; and his commands, how carefully soever framed, may be erroneously interpreted. There is no good or safe remedy

* 741 for the first of these evils, but a resort to the * legislative power for new provisions. For the second there is a remedy, and human wisdom has applied it. "Time" (as was most eloquently said by Lord PLUNKET) "is the great destroyer of evidence, but the law has wisely and humanely made him the protector of title. If he comes with a scythe in one hand to mow down the muniments of our possession, he bears in the other an hour-glass, whence he metes out incessantly those portions of duration which are to render unnecessary the muniments that he has destroyed." Thus far the wisdom of the lawgiver.

A like remedy has been applied to the third evil by the wisdom of the Judge, who, after men have been suffered for a length of time to misconstrue the lawgiver's commands, will not permit advantage to be taken of their innocent mistake to work their ruin. What once was crude error becomes sound law by the humane wisdom of the Judge, as by the healing power of nature an ulcerous mass becomes a vital part of our bodily frame. If ever there was an instance in which a common error (supposing, which I deny, that it was an error) might be permitted, mercifully towards its victims, to make the law, it surely is that case in which the supposed misapprehension of the law, sanctioned by such illustrious names as HOLT, and COMYN, and SCOTT, and KENYON, has involved the dearest interests, the security, the station, the fortunes, the

fame of thousands ; in which the victims of such a mistake are not even those who were beguiled into it by those venerable authorities, but their offspring, wholly guiltless even of the venial offence of falling into the error.

My Lords, I humbly move you to give judgment for the plaintiff in error ; but if you shall not feel prepared at present to take this step, I then beseech * you, I ear- * 742 nestly beseech you, not to give judgment for the defendant in error. I recommend you to delay your final award in this great cause, until you have an opportunity of receiving the useful and needful assistance of the learned Judges who preside in the consistorial and other civil-law Courts of the realm. To those Courts, properly speaking, the cognizance of the question belongs which this writ of error raises, and upon which alone its decision turns. The argument of the learned Judges in the Courts of Common Law, alone now consulted, admits, nay asserts, the peculiar dominion of the Courts Christian over such questions. In the other Supreme Court of Appeal, the Privy Council, we always have in such questions the inestimable benefit of that assistance. This House has undeniably a right to call for it, and I trust you will call for it, if you are not now prepared to reverse the judgment below.

LORD ABINGER. — It can hardly be expected of me that I should, in the short time that I have had for deliberating, put the argument I have to submit to your Lordships into the form to which my noble and learned friend has reduced his ; or that I should enter upon any elaborate discussion in answer to the very ingenious and the very learned and profound argument which he has just delivered ; but yet I think I ought not to shrink from delivering my opinion upon this question, which unfortunately differs from that of my noble and learned friend. When we have so large a majority as we have of the Irish Judges, who heard this subject discussed in the most full and deliberate manner, and when we have the additional authority of almost all the English Judges, after the most elaborate arguments on both sides, I should * think myself * 748 indeed very bold, if, without an investigation which I

cannot say I have had an opportunity of making in private upon this subject, I should venture to differ from so many and such profound authorities. And much as I admire the composition and respect the investigating powers of my noble and learned friend, I must say that the argument he has delivered has not convinced me that the learned Judges are wrong.

. At the time when the matter was discussed at your Lordships' bar, I made it my duty to attend deliberately to the various arguments that were adduced on either side. I have since looked at the opinion delivered on behalf of the learned Judges by the Lord Chief Justice of the Common Pleas; and I must own that that opinion has confirmed the opinion I originally formed when I heard the arguments at the bar, that the judgment of the learned Judges in Ireland was right, and to that opinion I still adhere. I shall not enter into an elaborate discussion of the cases or the reasonings adduced by my noble and learned friend. There are but two or three points of his argument to which I shall venture shortly to advert. The question is whether or not a contract of marriage *per verba de presenti* is *ipsum matrimonium*; that is the true question. Now it is admitted by my noble and learned friend that it is not for all purposes attended with the legal consequences of marriage; that it is not good for dower.

LORD BROUGHAM. — No, I do not admit that; it is distinctly denied.

LORD ABINGER. — Then I have misunderstood my noble and learned friend. I consider, however, that point to have been fully established by the authorities referred to by the Judges.

* 744 * My noble and learned friend has quoted the case of *Collins v. Jessot*, (a) where Lord HOLT is supposed to have said that it is a marriage, but that the parties, if they consummate it before the solemnization *in facie ecclesie*, are liable to ecclesiastical censure; that it is *ipsum matrimonium*,

(a) 6 Mod. 155; 2 Salk. 437.

but that it is, nevertheless, not a marriage for the purpose of cohabitation. It seems to me very extraordinary to say that a marriage shall be valid to all intents and purposes, and yet that it shall not be followed by the immediate object which the parties had in contemplation in the marriage. I mention that as an instance of inconsistency, which either proves that Lord HOLT is not correctly represented, or that the interpretation of his opinion is more correctly given by the opinion which the learned Judges have communicated to this House than by the opinion of my noble and learned friend.

LORD BROUGHAM. — The learned Judges say that it is good by the canon law.

LORD ABINGER. — It cannot be good, I should think, by any law, if they are liable to censure for consummation, for treating each other as husband and wife. It cannot be that it is lawful matrimony in the eye of God and man, and yet, if the parties cohabit together, they are liable to the censure of the Ecclesiastical Court.

There is one topic which appears to me, after all, the most forcible to which my noble and learned friend has addressed himself, and that is the case of the Quakers and the Jews; and I am free to admit that that question presented very considerable difficulties before the Marriage Act. I am not prepared to say or to admit that before the Marriage Act, the * marriages of Jews and Quakers were good by * 745 the law of this country; but since that Act, I think that under the clause therein which excepts those marriages from the operation of that Act, they are by implication to be deemed good. The Marriage Act itself does not declare that a contract *per verba de præsenti* shall be null and void; it only denies to the Ecclesiastical Court the right, which it before exercised, of enforcing marriage in consequence of that contract. If such contracts were actually legal, it leaves those marriages as they were before; it makes no alteration in the actual effect of a contract *per verba de præsenti*, by abolishing a particular remedy, and therefore those marriages would still remain lawful marriages; it does not declare the

contracts to be null and void, but only declares that the Ecclesiastical Court shall not interfere to compel a solemnization of marriage upon such a contract ; but such marriages, if good before, would still be good, the Act not declaring the contract to be null and void.

There is only one other topic to which I shall address myself on this occasion ; that is, respecting the ecclesiastical law of England, upon which the whole foundation of the argument rests. My noble and learned friend seems to consider that the ecclesiastical law of England is to be derived from the ecclesiastical law of the Continent. Now I beg to observe that he has not at all satisfied my mind upon that part of the argument. The learned Judges have, I think, satisfactorily derived it from the constitutions of the ecclesiastical synods and councils in England, before the authority of the pope was acknowledged in this country. I take that part only of the foreign law to be the ecclesiastical law of

England which has been adopted by Parliament or
 * 746 the Courts of this country, * from the decretals of popes and the authority of councils on the Continent. It is admitted that, by the constitutions of Lanfranc in the year 1076, there is an express declaration that a marriage shall not be good unless it be solemnized by a priest. The same appears in the laws of King Edmund, at a much earlier period. Then how comes it that that is no longer a part of the law of England ?

LORD BROUGHAM. — It is because it is not *in facie ecclesiæ* ; it says a priest, not a deacon.

LORD ABINGER. — I do not want to enter into minute differences now, which I think are sufficiently explained by the argument of the Judges ; I am only stating the broad lines of argument upon which I proceed, and on which I think the learned Judges are well founded in their opinion, that by the ecclesiastical law of England the presence of a priest, or, since the Reformation, of a person in holy orders, is necessary to constitute a legal marriage. Those who have taken the trouble to investigate and make written notes of the author-

ities, have, of course, an advantage over me; I profess to adhere to the opinion which I formed on consideration of the arguments at the bar. It appears to me that the opinions delivered by the Chief Justice, on behalf of the learned Judges, are incontrovertible and conclusive.

LORD CAMPBELL. — After the most anxious consideration of the opinion delivered by the learned Judges in this case, I am unable to concur in it, and I cannot advise your Lordships to act upon it. I need not express my high respect for the individuals now administering justice in the Courts of Common Law in Westminster Hall, or the reverence with which I must regard whatever is laid down by Lord Chief Justice * TINDAL, — a Judge who, for learning * 747 and ability, is not inferior to the most distinguished of his predecessors.

I certainly much regret that, upon a subject of such infinite importance and such great difficulty, the time has not been allowed to the Judges which they themselves stated they considered necessary for duly examining and weighing the conflicting authorities and arguments brought forward at your Lordships' bar. When you avail yourselves of your privilege of consulting the Judges on any question of law which you have to consider, you generally have the advantage of knowing the reasons by which they are swayed; for they either deliver their opinions *seriatim*, each expressing his own reasons; or the Judge highest in rank, who delivers their unanimous opinion, expresses reasons in which they have all concurred. On this occasion the reasons are the reasons of the Chief Justice alone, and we are left entirely in the dark as to the process by which the others arrived at the conclusion that the first marriage entered into by the prisoner with Hester Graham before a Presbyterian minister — which both parties intended and believed to be a present valid marriage, and under which they cohabited together for years as man and wife, without any doubt as to its validity — was null and void. In the Courts below, upon questions of great magnitude, it has not been unusual for the different Judges of the Court to give their opinions with their reasons separately, even

when they agree in the judgment; of which we have a memorable instance in the case of *Stockdale v. Hansard*; (a) and I think your Lordships will not have the full benefit of consulting the Judges unless they deliver their opinions

* 748 separately, or are understood * to concur in the reasons assigned by the Judge who delivers their unanimous opinion. It is possible that for the same opinion contradictory reasons might be given, and that the weight to be ascribed to it may be much lessened by those who join in it combating and overthrowing the arguments of each other. In the present case we have particularly to lament that we are informed of the reasoning only of one Judge, as he states that "it was only after considerable fluctuation and doubt in the minds of some of his brethren that they had acceded to the opinion which was formed by the majority." I should have been much gratified and edified by being informed of the course of this fluctuation; what the doubts were which weighed in the minds of those learned persons, and by what train of reasoning those doubts were dispelled.

Now it is most essential that your Lordships should bear in mind the facts found by the special verdict. If George Millis had merely entered into a contract *per verba de præsenti* to marry Hester Graham, the parties not considering the engagement a present marriage, and intending that before they lived together as man and wife it should be solemnized by a subsequent ceremony, I should have agreed with the Judges that the man would not have committed bigamy by afterwards marrying another woman. Betrothment is not matrimony. Were a priest in orders accidentally present at such a betrothment, and the parties, instead of intimating before him that they intended to be then married, expressed their intention that it was only an absolute engagement that they should afterwards become man and wife; by whatsoever form of words that engagement might be expressed, this would not have been *ipsum matrimonium*. But the jurors, by the

* 749 special verdict, say, "that in January, 1829, * George Millis, accompanied by Hester Graham, spinster, and

(a) 9 Ad. & El. 1.

three other persons, went to the house of the Rev. John Johnstone, of Banbridge, in the county of Down, the said Rev. John Johnstone then and there being the placed and regular minister of the congregation of Protestant dissenters commonly called Presbyterians; and that the said G. Millis and H. Graham then and there entered into a contract of present marriage, in the presence of the said Rev. J. Johnstone and the said other persons, and the said Rev. J. Johnstone then and there performed a religious ceremony of marriage between the said G. Millis and H. Graham, according to the usual form of the Presbyterian church in Ireland; and that after the said contract and ceremony the prisoner and the said Hester for two years cohabited and lived together as man and wife, the said Hester being after the said ceremony known by the name of Millis." Now this was not a mere betrothment; this was not a mere executory contract *per verba de præsentis* for a marriage thereafter to be solemnized; this was, as it was meant to be, *ipsum matrimonium*. Here we have not only *pactum*, not merely *sponsali*, but *nuptiæ per verba de præsentis*. I rely upon the distinction between a contract *per verba de præsentis* for a marriage to be afterwards solemnized, and *nuptiæ per verba de præsentis* without any contemplation of a future ceremony as necessary to complete the relation of man and wife; a distinction (I speak it with the most profound respect) which I think the learned Judges have not sufficiently kept in view. The use of the expression "contract of marriage" is equivocal, and may mean the actual formation of the relation of husband and wife; but it may mean only an irrevocable engagement to be afterwards carried into effect, the parties not meaning then to become husband and * wife, and their engage- * 750 ment therefore, though words in the present tense are used, not amounting to *nuptiæ*.

This distinction may be illustrated by the decisions respecting leases. The general rule is, that a contract to let land *per verba de præsentis* is *ipsa locatio*; the term is instantly created, and the interest vests in the lessee without the execution of a formal instrument of demise; but if it appears to have been the intention of the parties that, till a formal in-

strument of demise was executed, the relation of landlord and tenant for the stipulated term should not be constituted between them, the instrument containing words of contract *per verba de præsenti* is considered only an executory agreement, the specific performance of which may be enforced in a Court of Equity, and a subsequent lease to another would be good at law till set aside on the ground of the precontract; but where the contract to let *per verba de præsenti* is intended by the parties to operate immediately, it is *ipsa locatio*, however informal it may be, and a subsequent lease to another is merely void. In the present case it is clear that the parties contemplated no further ceremony completely to constitute the conjugal relation between them, and that they at the time of the ceremony intended to become, and believed that they had become, husband and wife.

The only objection that can be taken to the validity of this marriage is, that there was not present at it a priest or deacon episcopally ordained, or a person believed by the parties to be a priest or deacon episcopally ordained; and the question arises, whether by the common law of England, which is allowed to be the common law of Ireland, there could not be a valid marriage without the presence of a priest or

*751 deacon *so ordained, or believed by the parties to be so ordained: The condition contended for as indispensable to the validity of marriage, is the presence of a person believed by the parties to be in priest's or deacon's orders. It is not considered essential that he should pronounce a benediction, or join in any religious ceremony; and though he never was episcopally ordained either as priest or deacon, his presence is sufficient, if the parties believe that he is in priest's or deacon's orders: while a marriage celebrated by a clergyman who is actually in Presbyterian orders, and who is believed by the parties to be entitled by the law of God and the law of the land to marry them effectually, is a nullity. Such is the common law contended for by the counsel for the prisoner; but surely the *onus* lies on those who maintain that such is the common law to make out their proposition by decided cases and text-writers of authority.

I must be allowed to point out to your Lordships the ex-

treme improbability of the common law of England requiring the presence of a priest to the validity of marriage. I think it is quite clear that by the general law prevailing in the western church prior to the Council of Trent, — although a marriage, to be regular, ought to have been *in facie ecclesiæ*, — for a marriage to be valid, so that the parties would not be considered as living together in fornication, and their issue would be legitimate, the presence of a priest was quite unnecessary. Marriage, as a sacrament, was considered a matter of ecclesiastical jurisdiction; the validity of marriage was decided in the Ecclesiastical Courts; from those Courts there was an appeal to Rome as a common forum. The proceedings in the divorce suit between Henry 8 and Catharine of Arragon afford the most recent and the most striking *instance of the law of marriage in England being *752 considered as governed by the law of marriage prevailing in other Christian countries.

Now, that by the general marriage law of Europe, before the Reformation and before the Council of Trent, there might be a valid marriage without the presence of a priest, is clearly demonstrated by the canonists cited at the bar. I will confine myself to two authorities as quite sufficient for this purpose. In the work of John de Burgh (a canonist of the highest reputation), entitled "*Pupilla Oculi*," there is a chapter "*De sacramento matrimonii*," in which we find this doctrine expressly laid down: "De ministro hujus sacramenti notandum est quod non requiritur alius minister distinctus ab ipsis contrahentibus; ipsimet enim ut plurimum sibi ipsis ministrant hoc sacramentum, vel mutuo vel uterque sibi. Patet etiam quod ad collationem hujus sacramenti non requiritur ministerium sacerdotis, et quod illa benedictio sacramentalis, quanquam solet presbyter facere sive perferre super conjuges, sive aliæ orationes ab ipso probatæ, non sunt forma sacramenti, nec de ejus essentia, sed quoddam sacramentale ad ornatum pertinens sacramenti." He afterwards goes on to state that marriage ought to be solemnized openly before a priest, but intimates that a clandestine marriage, where no priest is present, is binding and valid in law. Fernando Walter, now a professor in the University of Bonn, in

his Treatise on the Canon Law, a work highly esteemed on the continent of Europe, speaking of the decree of the Council of Trent on this subject, says: "The provision is new that both parties must declare their intention before their proper parochial minister and at least two witnesses: this form is

declared so essential that without it the marriage is

* 758 *altogether void; but yet the object is only to secure

a trustworthy witness in order to the precise ascertainment of the marriage, wherefore the persons mentioned need not have been expressly invited to be present. Nay, even the opposition of the parochial minister does not prevent the validity of the marriage, if he has merely heard the declaration."

He goes on to explain the difference between a regular marriage before a priest and a clandestine marriage without a priest, but considering them equally effectual: he says, "Marriage is a contract which ought, according to the ancient usage, to be confirmed by the priestly benediction; and properly this ought to be given by the proper parochial minister, or some one authorized by him according to the rules of the church. Other ceremonies are also to be observed. None of all this, however, is essential to the validity of the marriage."

The decree of the Council of Trent respecting the solemnization of marriage requires the presence of the parish priest, or some other priest specially appointed by him or the bishop; but, even under this decree, the priest is present merely as a witness; it is not necessary that he should perform any religious service, or in any way join in the solemnity. This view of the subject is illustrated by the case of Lord and Lady Herbert. (a) They were married in Sicily, where the decree of the Council of Trent is received. They got the parish priest to attend at the house of the lady, and two of her servants were called up. In the presence of these witnesses she said, "I take you for my husband;" and he said, "I take you for my wife." Nothing more passed, and this

was held to be a valid marriage in Sicily, and therefore
* 754 all the world *over. It thus appears quite certain that, according to the doctrine of the Roman Catholic

(a) 3 Phill. 58; 2 Hagg. Cons. Rep. 263.

church, no religious ceremony was or is necessary to the constitution of a valid marriage. Although marriage is considered a sacrament, this sacrament, like baptism, might be administered, under certain circumstances, without the intervention of a priest; the parties being liable to be censured for the irregularity of dispensing with the conjugal benediction, and neglecting to make the proper offering to the church. There is not a trace in any ecclesiastical writer of the law of marriage in England being different from the law of marriage in other Christian countries. I earnestly entreat your Lordships to bear in mind that I by no means say every contract of marriage using words *de presenti* was *ipsum matrimonium*; on the contrary, in England, and I believe in the rest of Europe, an absolute engagement to become man and wife at a future time did not amount to present marriage; but if the parties had wished and intended to enter into present marriage without the presence of a priest, they might have done so, subject to church censures for irregularly contracting the relation of man and wife, — not for living together in sin; and I will use the freedom to make an observation upon what has fallen from my noble and learned friend who last addressed your Lordships, who would infer that the parties who have contracted *per verba de presenti* were not man and wife till the marriage was celebrated, because Lord HOLT says that the parties might be liable to censure if they lived together before the celebration of marriage. Now, I believe it is not disputed that in Scotland there may be a valid marriage *per verba de presenti* without the intervention of a priest; and I can state of my own knowledge — being the son * of a minister of the Church of Scotland, and * 755 having myself been present at such proceedings — that the parties who have been living together as man and wife after an irregular marriage are considered as liable to church censure, and are not admitted to the communion of the church until they have been censured, and have expressed their regret for not having complied with the rules of the church; but that the marriage is *ipsum matrimonium* has never been doubted.

THE LORD CHANCELLOR. — Suppose there is a contract *per verba de præsenti*, and nothing further, — no cohabitation; would the church under such circumstances interfere by its censures?

LORD CAMPBELL. — That case has not come within my observation. The cases to which I refer, and which are not at all unfrequent, are those of a runaway, or what is called a half-mark marriage, where the parties contract *per verba de præsenti*, and where they live together as man and wife, and are unquestionably man and wife, and where the children would be legitimate if the parents died without any further ceremony; that was decided by your Lordships' House in the case of *M'Adam v. Walker*, (a) where the man shot himself the instant he declared that the woman he had married was his wife. In those cases still the church considers the marriage as irregular, and summons the parties before the kirk session, and rebukes them for not having observed the rules of the church.

LORD BROUGHAM. — I have heard the censure of a clergyman for solemnizing a marriage without publication
* 756 of banns, which is reckoned irregular; but I * never heard of parties being liable to rebuke, or that they have come before the congregation or kirk session, for merely marrying privately without cohabiting.

LORD CAMPBELL. — It is for living together as man and wife without having been married by a clergyman that the censure is pronounced.

But to show that there was a peculiar law in England on this subject, even in the time of the Anglo-Saxons, there is cited to us a supposed law of King Edmund, directing “that at the nuptials there shall be a mass-priest, who shall, with God's blessing, bind their union to all prosperity.” Setting aside the grave doubts which have been entertained of the

(a) 1 Dow, 148.

genuineness of this document, does it show, that while a mass-priest is directed to be present at nuptials, nuptials without the presence of a mass-priest would be void, and that this ever after was the law of England? Then is a marriage void that is celebrated by a deacon? for he is not a mass-priest, and his presence would as little satisfy the law as that of the verger or the sexton.

There were then cited to us numerous decrees of provincial councils on the subject of marriage, the great object of which was to discourage clandestine marriages, and to require that all marriages should be celebrated in the face of the church; but there is no reason to suppose that the prelates who presided at these councils, many of whom were foreigners, intended to introduce any law touching the essentials of marriage different from what prevailed in the rest of Christendom; they were only in the nature of by-laws, to be observed in a particular diocese or province, to prevent as much as possible all clandestine marriages, either with or without the intervention of a priest. I believe there is only one of these constitutions, that of Archbishop Lanfranc in the year 1076, * which professes to nullify a clandestine marriage, by declaring that a marriage without the benediction of the priest should not be a legitimate marriage, and that other marriages should be deemed fornication. But this denunciation goes further than the law is supposed ever to have gone; for the blessing of the priest was not essential to the validity of the marriage, if he was present, and the denunciation may rather be taken to be *in terrorem* than as making or declaring the law. * 757

The different decrees against clandestine marriages seem to me to have no cogency to show that there was in England any peculiarity respecting the law of marriage as held by the Ecclesiastical Courts. These decrees, if they were supposed to apply to the validity of the marriage, are contrary to the plainest propositions of canonists, both foreign and native, and to the universal practice of Christendom. The existence of such a peculiarity seems wholly inconsistent with the procedure by which that law was administered. The church of Rome, in every country under its jurisdiction, was most

anxious that marriages should be publicly celebrated in the presence of a priest; first, for the laudable object of preventing imprudent unions by which the peace of families might be disturbed; and secondly, for the excusable object of collecting fees from the faithful. It was proved before your Lordships' committee on the law of marriage in Ireland that a principal part of the emoluments of the Roman Catholic clergy in Ireland now arises from fees on marriages, and that for this reason they are celebrated at the times, in the places, and under the circumstances when it may be expected that the contributions will be most bountiful. But till the Council of Trent, when marriages were absolutely required

* 758 to * be before the parish priest, or some other person duly authorized by the bishop or the parish priest to officiate, — and all other marriages were declared to be null, — the doctrine of the church of Rome certainly was that there might be a valid marriage without the intervention of a priest; and if that was so, it was hardly possible that any different law should prevail in any state subject to her jurisdiction.

In England, the common-law Judges professed, with respect to marriage, to be governed by the Ecclesiastical Courts; those Courts alone took direct cognizance of the validity of marriage; and when the question arose incidentally before the common-law Judges, they referred themselves to the bishop as the ecclesiastical Judge, and were governed by the certificate which he returned. Upon some occasions the validity of marriage arose as a question before the common-law Judges when they could not consult the bishop. On such occasions they would have regard to the ecclesiastical law, and decide accordingly; but the bishop would not on any occasion disregard the general ecclesiastical law, and be guided by any different rules laid down by the Courts of Common Law.

Let us now see whether there are any common-law decisions to the effect that there cannot be a valid marriage without the presence of a priest. I must again remind your Lordships that this is the question, and not whether a mere executory contract to marry constitutes marriage. There has

been cited to us from Lord HALE's manuscripts the note of a case (a) supposed to have been decided in the reign of Edw. 1, the statement of which is so scanty and obscure that I think no weight can safely be given to it as an exposition * of the law in that reign. We are not told how * 759 A. contracted with B., or that any ceremony or form intended as spousals passed between them. It is said that A. married C., from which it may be inferred that he did not intend that his contract with B. should operate as a present marriage, and that his contract with her, although *per verba de præsenti*, was only meant to be executory. However, in the Court in which the action was originally brought, it was held that B. was dowable of the lands in question, which could only be on the ground that A. and B. were husband and wife from the time of the contract, for the marriage could not possibly date from the sentence of the ordinary. The judgment was reversed "*coram Rege et Concilio*." This is suggested at the bar to have been on a writ of error in Parliament. There can be no doubt that one of the King's Councils at that time consisted of the Chancellor, the Treasurer, the Barons of the Exchequer, the Judges of either Bench, with the King's Serjeant and the King's Attorney-General, and that they assisted in deciding cases brought before Parliament; but I am not aware that a writ of error in Parliament was ever said to be *coram Rege et Concilio*. On the contrary, my Lords, this was the style of the Star Chamber, and I conceive that the case must be considered as an instance of the irregular interference by the King and his Privy Council with the ordinary administration of justice; the reversal of the judgment may have been out of favour to D., to whom the feoffment was made by A. after he was excommunicated. Lord HALE adds, "neither the contract nor the sentence was a marriage." The sentence could not be a marriage, no more could the contract, if it was intended not as *nuptiæ*, but only as an engagement to marry.

* Then come the two cases of Foxcroft and Del * 760 Heith, and I must express my astonishment that any

(a) Co. Litt. 83 a, n. 10.

reliance should be placed upon them in support of the proposition that marriage without a priest is void. If they prove any thing, they prove that marriage by a priest is void unless celebrated *in facie ecclesiæ*. Foxcroft was married in a private chamber by the Bishop of London, and the only objection taken to the validity of the marriage was, that it did not take place in a church or chapel, and that it was without the celebration of mass. *Del Heith's Case* is precisely the same in its leading facts ; there was not a mere contract *per verba de præsenti*, but *nuptiæ* were actually celebrated. Del Heith was solemnly married to the woman by his parish priest ; and because the marriage was in a private chamber, and not *in facie ecclesiæ*, the son born after the marriage was adjudged a bastard. Can these cases have been decided according to the law of England, as it stood in the reign of Edward 1 ? Was a marriage solemnized by a priest in orders, or by a bishop in a private chamber, absolutely void ? If so, when was the law introduced by which it was made void ? It is not pretended that in the time of the Anglo-Saxons more was required than a benediction by a mass-priest, which might as well be given in a private chamber as in a church or chapel. If, in the reign of Edward 1, all marriages were void except such as were celebrated in the face of the church, when and by what authority did private marriages by a priest in orders become valid ? Could an ecclesiastical canon, sanctioned by the pope, without the consent of the King and Parliament, effect the change ? If it could, where is any such canon to be found ?

I had always thought that these two cases had been allowed to have been decided contrary to law, and I have no
 * 761 doubt that they were so. They may now be * cited quite as much to show that a marriage is void by the canon law, if privately solemnized by a bishop, as that an actual marriage is void without the presence of a priest. They prove a great deal too much, or they prove nothing at all. But I cannot dismiss them without this observation, which they fully illustrate, that you cannot safely take the law upon such a subject from two or three cases, supposed to have been decided in very remote times, which may be mis-

reported, and which may be the result of haste, violence, or corruption. I should cite Foxcroft's and Del Heith's cases to show that the law upon such a question may best be learned from text-writers of authority, calmly and deliberately and impartially speaking the general opinion of the legal profession at the time when they were published. In no writer, lay or ecclesiastical, is it said that a marriage privately solemnized by a priest is void, or that a marriage is void there being no priest present. It is laid down that a second marriage by a man already married is void, while a marriage after a contract *per verba de præsenti* is only voidable. This shows that the mere executory contract, although indissoluble, is not marriage; but does not show that there might not have been a complete marriage without a priest had the parties so wished and intended.

The authority of Perkins has been greatly relied upon at the bar, as showing that unless there be a marriage by a priest, the woman shall not have dower. Now, without considering whether this may mean dower *ad ostium ecclesiæ*, I would first question whether the right to dower would be a certain test of marriage. For the church, the test is whether the parties are considered as living together in lawful wedlock; and for the lay tribunals, whether the issue * be legitimate. But I think it is quite clear that the * 762 woman who, according to Perkins, shall not have dower, is a woman who had entered into an executory contract of marriage to be afterwards solemnized; for he says: (§ 306) "If a man seised of land in fee make a contract of matrimony with J. S., and he dies before the marriage is solemnized between them, she shall not have dower, for she never was his wife." Does he not, in the most explicit manner, intimate that, according to the intention of the parties, the contract of matrimony between them was to be afterwards solemnized? that they never intended the contract to operate as marriage, and that, till the solemnization, they were not to live together as man and wife? Wherever Perkins uses the expression "contract of marriage," he places it in opposition to actual marriage; as in title "Feoffments," where he says: "If a contract of marriage be between a man

and a woman, yet one of them may enfeoff the other, for yet they are not one person in law, inasmuch as if the woman dieth before the marriage solemnized betwixt them, the man unto whom she was contracted shall not have the goods of the wife as her husband." He is here plainly speaking of an engagement to marry. Bracton, on the contrary, when he is considering the subject of gifts between husband and wife, supposes the parties to be married whether they marry with or without the forms of the church, their intention being to enter into the married state: "*Matrimonium autem accipi possit, sive sit publice contractum vel fides data quod separari non possunt, et re vera donationes inter virum et uxorem constante matrimonio valere non debent.*" With the plighting of troth, which he supposes to take place without any public ceremony, the parties come together as man
 * 763 and wife, so that they * cannot be separated. This is totally different from the contract of Perkins to be afterwards solemnized, and is attended with totally different consequences.

The next case much relied upon at the bar was *Bunting v. Lepingwell*: (a) and supposing that Bunting and Agnes Addishall had gone through the form of a present marriage without the presence of a priest, or had said or done anything which they intended to operate as present marriage, the case would have been very important; for on that supposition, if I am right in supposing that by the common law the presence of a priest was not necessary to the validity of marriage, no doubt could have arisen as to the legitimacy of Charles Bunting, the second marriage being absolutely void, and there being no occasion for any sentence of the Ecclesiastical Court to set it aside, or "*quod prædicta Agnes subiret matrimonium cum præfato Bunting.*" But in referring to the special verdict, it is quite clear that Bunting and Agnes, although they used *verba de præsentī*, did not thereby mean to become man and wife, but merely entered into an absolute engagement to solemnize a marriage between them at a future time; it was only an executory contract; and when Agnes

(a) 4 Rep. 29; Moor, 169.

had taken Twede to husband, Bunting libelled her on the contract. Bunting and she under this engagement never had lived together, or intended to live together, as man and wife; their engagement, therefore, was only in the nature of a pre-contract, which might then be enforced in the Ecclesiastical Court, and which rendered a subsequent marriage with another voidable, but which did not in itself amount to a marriage. But where is the case in * which it * 764 has been held that if parties intend to enter into the state of matrimony, and use a ceremony *per verba de præsenti*, and live together as man and wife, and believe that they are lawfully united in holy wedlock, this was a mere executory contract; that a subsequent marriage by one of them during the life of the other would not be void; and that such a subsequent marriage must be set aside on the ground of precontract? I quite agree that the contract actually entered into between Bunting and Agnes neither constituted, nor was ever intended to constitute, a complete marriage, without the intervention of a religious ceremony.

The case of *Weld v. Chamberlaine* (a) is relied upon by both sides; Chief Justice PEMBERTON having there held that a marriage by an ejected minister, without a ring, and without following the ritual of the Church of England, was valid. But I cannot help thinking that the opinion of the Chief Justice was chiefly influenced by the consideration that this was not a mere contract to marry hereafter; that both parties intended at the moment to enter into the married state; that *nuptiæ* had been celebrated between them; and that he would have given the same effect to the ceremony, if, instead of an ejected minister who had been episcopally ordained, but was not then recognized by the church, the clergyman present had been ordained by the imposition of hands of several ejected ministers, or, in other words, a Presbyterian minister.

The only other case much relied upon by the counsel for the prisoner was *Haydon v. Gould*. (b) Here there was an actual marriage, and the man and the woman intended to

(a) 2 Show. 800.

(b) 1 Salk. 119.

become husband and wife, and believed that they
 * 765 were so, and lived together as such for * seven years,
 till she died. They were of a sect called Sabbatarians,
 and were married by one of their ministers in a Sabbatarian
 congregation, and used the form of the Common-prayer,
 except the ring. Had there been a decision of a Court of
 Law that this was no marriage, and that the issue were
 illegitimate, it would have been expressly in point; but the
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 tion there was, whether the husband was entitled to adminis-
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 by the delegates, that the husband could not demand admin-
 istration from the Ecclesiastical Court, as he had not been
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 haps it should be so that the wife, who is the weaker sex, or
 the issue of this marriage, who are in no fault, might entitle
 themselves by such marriage to a temporal right." The
 delegates, therefore, who allowed the husband to be punished
 for his nonconformity to the church, instead of deciding the
 marriage to be void, appear to have intimated an opinion that
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 presbyterum sacris ordinibus constitutum.*" But if this were
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 which are now admitted to be valid. Had there been a
 reference to the Court which decided *Haydon v. Gould*,
 pending a real action involving the question of the legitimacy
 of the eldest son, there is reason to suppose the certificate
 would have been that he was born *in justis nuptiis*; and I
 make no doubt that in such a case such an answer would
 have been returned by the bishop in early times, when
 * 766 it was the universal opinion of the * Western church
 that to administer the sacrament and to constitute the
 bond of marriage, the presence of a priest was unnecessary.
 With respect to the refusal of administration to the husband,
 I am by no means clear that the same decision would not
 have taken place under a clandestine marriage by a Roman
 Catholic priest.

Beau Fielding's Case is exceedingly entertaining to read, but throws no light upon the present controversy, as no question arose as to the validity of the first marriage, and his guilt depended upon the credit of the witnesses who swore to the second.

The Sabbatarian case was decided in the ninth year of Queen Anne, and I will venture to say, that from that time downwards till the present controversy arose, above 130 years, the opinion of all the greatest Judges who have presided in Westminster Hall and in Doctors' Commons has been, that by the common law the presence of a priest in orders was not indispensably necessary to the celebration of a valid marriage.

In *Jesson v. Collins*, (a) we have the *dictum* of that distinguished Judge, Lord HOLT, "that a contract *per verba de præsenti* was a marriage." He, no doubt, meant where it was intended to operate as a present marriage, and he expressly excluded the presence of a priest. It seems to me plain that by a marriage, he must be understood to intend a marriage by the common law of the land. It has been supposed that this could not be his meaning, because in *Wigmore's Case* he says, "by the canon law, a contract *per verba de præsenti* is a marriage. Both propositions are true, and both are consistent. The common law adopted *that maxim of the canon law with respect to the * 767 validity of marriages. This will be found to be the opinion and the language of Sir W. SCOTT, the Judge of the highest authority on this subject who has ever presided in an English Court of Justice. HOLT appears to have said in *Wigmore's Case*, as was said by the delegates in *Haydon v. Gould*, that to entitle the parties to all the privileges attending legal marriage, marriages ought to be solemnized according to the rites of the Church of England; but he gives no countenance to the notion that the marriage by the minister of the congregation who is not in orders is a nullity, and that the children would be bastards. We have the authority of Mr. Justice GOULD, Mr. Justice POWIS, and that distin-

(a) 2 Salk. 437.

guished Judge, Mr. Justice JOHN POWELL, to the same effect as that of Lord HOLT; for according to the report of *Jesson v. Collins*, under the name of *Collins v. Jessot*, (a) the Chief Justice saying, "if a contract be *per verba de præsenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God as if it had been *in facie ecclesiæ*;" the reporter observes that to this the whole Court agreed, "*quæ omnia tota Cur. concess.*"

I do not find the subject again discussed till the publication of Blackstone's Commentaries; where, if anywhere, we may look to find the principles of our jurisprudence. If he has fallen into some minute mistakes in matters of detail, I believe upon a great question like this, as to the constitution of marriage, there is no authority to be more relied upon. He

began, before the Marriage Act, to read the lectures
 * 768 * at Oxford, which became the Commentaries, but did not publish them till after, and his attention must have been particularly directed to the law of marriage. Does he say that at common law marriage could not be contracted in England without the intervention of a priest? His words are, "Our law considers marriage in no other light than as a civil contract; the holiness of the matrimonial state is left entirely to the ecclesiastical law." (b) He lays it down in the most express terms, that, before the Marriage Act, in England a marriage *per verba de præsenti*, without the intervention of a priest, was *ipsum matrimonium*. He says that for many purposes it was marriage; it must have been marriage to make the children legitimate, for that is the test by which a valid marriage is to be determined; and if it makes the children legitimate, there can be no doubt it would be valid so as to make the person who has entered into it liable for the penalties of bigamy if he enters into a second marriage. He mentions Lord HARDWICKE'S Act (26 Geo. 2, c. 33); he then says, "Much may be and much has been said both for and against this innovation upon our ancient laws and constitution." He adds, "Any contract made *per verba de præsenti*, or in words

(a) 6 Mod. 155.

(b) 1 Black. Comm. 437.

of the present tense, and, in case of cohabitation, *per verba de futuro* also, between persons able to contract, was before the late Act deemed a valid marriage to many purposes." This passage is to be found in the twenty-five editions of his work, which have now for a period approaching to a century taught the law of England to this country and to all civilized nations who have had any curiosity to inquire into our polity.

* At last came the case of *Dalrymple v. Dalrym-* * 769
ple, (a) which was for many years understood to have finally settled the law by judicial decision. I believe it is universally allowed that Lord STOWELL was the greatest master of the civil and canon law that ever presided in our Courts, and that this is the most masterly judgment he ever delivered. I have read it over and over again, and always with fresh delight. For lucid arrangement, for depth of learning, for accuracy of reasoning, and for felicity of diction, it is almost unrivalled. Although it seems to flow from him so easily and so naturally, it is evidently the result of great labour and research. Luckily he had full leisure to mature his thoughts upon the subject, and satisfactorily to explain to us the authorities and arguments on which his opinion was founded. Your Lordships are aware that the case turned upon the validity of a marriage in Scotland, *per verba de præsenti*, without the intervention of a clergyman, and it became essential to consider what was the general law respecting the manner in which marriage was contracted. Your Lordships will find he clearly lays it down that there was the same law on the subject all over Europe, and that, till the Council of Trent, by this law there was no necessity for the intervention of a priest to constitute a valid marriage. Among other things to the same effect, he says, "The law of the church, although in conformity to the prevailing theological opinion it revered marriage as a sacrament, still so far respected its natural and civil origin as to consider that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest; it had even in *that state the character of a sacrament, * 770

(a) Hagg. Cons. Rep. 54.

for it is a misapprehension to suppose that this intervention was required as matter of necessity even for that purpose before the Council of Trent. It appears from the histories of that council, as well as from many other authorities, that this was the state of the earlier law till that council passed its decrees for the reformation of marriage. Such was the state of the canon law, the known basis of the matrimonial law of Europe. The canon law, as I have before described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. It becomes of importance, therefore, to consider what is the ancient general law upon this subject; and on this point it is not necessary for me to restate that by the ancient general law of Europe, a contract *per verba de præsenti*, or a promise *per verba de futuro cum copula*, constituted a valid marriage, without the intervention of a priest, till the time of the Council of Trent."

Lord KENYON had before laid down the same doctrine, though in a less peremptory manner: "I think," he says, "though I do not speak meaning to be bound, that even an agreement between the parties *per verba de præsenti* is *ipsum matrimonium*;" *Reid v. Passer*. (a) But ever since *Dalrymple v. Dalrymple*, every Judge who has touched upon the subject has unhesitatingly adhered to the law as there laid down by Lord STOWELL. In *Latour v. Teesdale*, Lord Chief Justice GIBBS says, (b) "The judgment of Sir W. SCOTT, in *Dalrymple v. Dalrymple*, has cleared the present case of all the difficulty which might at a former time have belonged to

it. From the reasonings there made use of, and from *771 the authorities cited by *that learned person, it appears that the canon law is the general law throughout Europe as to marriages, except where that has been altered by the municipal law of any particular place. From that case, and from those authorities, it also appears that before the Marriage Act marriages in this country were always governed by the canon law, which the defendants, therefore,

(a) Peake, N. P. Cas. 231, 1st ed.; 303, new ed.

(b) 8 Taunt. 837.

must be taken to have carried with them to Madras. It appears also that a contract of marriage *per verba de præsenti* is considered to be an actual marriage, though doubts have been entertained whether it be so unless followed by cohabitation."

In *The King v. Brampton*, (a) which turned upon the validity of a marriage contracted in a part of St. Domingo occupied by the English army, Lord ELLENBOROUGH says, "I may suppose, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognized by subjects of England in a place occupied by the King's troops, who would implicitly carry that law with them. It is then to be seen whether this would have been a good marriage here before the Marriage Act. Now certainly a contract of marriage *per verba de præsenti* would have bound the parties before that Act."

In *Smith v. Maxwell*, (b) tried before Lord WYNFORD, Chief Justice of the Common Pleas, where a question was made respecting the validity of a marriage in Ireland which had been celebrated by a dissenting minister in a private house, he observed, "I am aware of no Irish law which takes marriages performed in that country out of the rules which prevailed in this before the passing of that Act, and which, as it is said * in the case of *Dalrymple v. Dal-* * 772 *rymple*, are common to the greater part of Europe. That case has placed it beyond a doubt that a marriage so celebrated as this has been, would have been held valid in this country before the existence of that statute." That was a marriage celebrated in Ireland by a Presbyterian minister. (c)

THE LORD CHANCELLOR. — Between what parties ?

LORD CAMPBELL. — That would be quite immaterial. Lord WYNFORD says, "This marriage would have been valid in England before the Marriage Act." And in England there

(a) 10 East, 282.

(b) 1 R. & M. 80.

(c) The report in Ryan & Moody describes him as a clergyman of the Church of England.

is no statute which makes any distinction as to the religious persuasion of the parties married by a dissenting minister.

THE LORD CHANCELLOR. — So far it is a *dictum*.

LORD CAMPBELL. — But as far as respects this marriage in Ireland it is expressly in point. He says, “there can be no doubt that a marriage so celebrated (that is by a Presbyterian minister in a private house) would have been valid in England before the existence of the Marriage Act.” In *Beer v. Ward*, (a) another case on the validity of a marriage in England before the Marriage Act, Lord TENTERDEN laid it down distinctly, that if the parties in the presence of witnesses formally acknowledged themselves to be man and wife, that before the Marriage Act constituted a marriage valid in law, and that the issue would be legitimate. He said, “As I understand the law before the Marriage Act, a marriage might be even celebrated without a clergyman, upon a declaration by the parties, in terms of the contract, that they were man and wife, accompanied by cohabitation as man and wife.

A contract verbally made before witnesses, and a
* 773 * declaration of that in the presence of witnesses, would, at that time of our history, have made a good and valid marriage in England, as it does now in Scotland.”

THE LORD CHANCELLOR. — That is not in print.

LORD CAMPBELL. — It is not in print, but it is taken from the short-hand writer's notes, authenticated by Mr. Serjeant Clarke, who was counsel in the cause.

THE LORD CHANCELLOR. — I certainly heard him express himself to that effect.

LORD CAMPBELL. — Here, then, we have a most positive declaration by Lord TENTERDEN, a most cautious Judge and most attentive to the rights of the church, that before the

(a) *Vide ante*, 607 and 611.

Marriage Act the law of England and the law of Scotland upon this subject were the same; and that in England, if parties came together and declared that they were man and wife, and lived together as man and wife, they were married to all intents and purposes.

The doctrine of Lord STOWELL in *Dalrymple v. Dalrymple* has been recognized by all his successors, and I have reason to believe is at this day approved of both by the Judges and the bar in Doctors' Commons. In *Wright v. Elwood*, (a) Sir HERBERT JENNER, the present Dean of the Arches, a most learned civilian, and most cautious as well as laborious Judge, says, "Before 26 Geo. 2, c. 33, marriages without publication of banns or any religious ceremony, contracts *per verba de presenti*, might be good and valid, though irregular; the parties and the minister might be liable to punishment, but the *vinculum matrimonii* was not affected."

Now I come to criminal cases. In criminal as * well as in civil proceedings, the validity of a mar- * 774 riage by the common law, celebrated without the intervention of a priest in episcopal orders, has been repeatedly recognized by judicial decision. Lathroppe Murray was convicted of bigamy at the Old Bailey, in the year 1815. The case turned on the legality of the first marriage, which was celebrated in Ireland by a Presbyterian minister. The prisoner was a member of the Established Church, the woman to whom he was married a dissenter; the facts were the same as here. The recorder of London, after consulting the Judges, held the first marriage to be valid. The prisoner petitioned the House of Commons to interfere in his favour, on the ground that the first marriage was invalid. On that occasion Sir SAMUEL SHEPHERD, then Solicitor-General, a most learned and accurate lawyer, and then, I may say, speaking judicially, observed, "That in his opinion and that of the Attorney-General, after having examined every Act of Parliament in Ireland respecting the validity of the marriage ceremony, the first marriage was a legal one. That certain very eminent civilians in Ireland had been consulted several years before respecting that marriage, all of whom declare

(a) 1 Curt. 670.

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 till she died. They were of a sect called Sabbatarians,
 and were married by one of their ministers in a Sabbatarian
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(a) 2 Salk. 437.

convictions were illegal? and that if, upon a second conviction, there had been a counter plea to the prayer of clergy, the Judges who gave effect to it would have been guilty of murder? I refrain from citing the passages from Chief Baron COMYN's and other abridgments of the common law, to show the constant opinion of the profession in this country; but I cannot refrain from asking your Lordships to consider how the subject has been viewed by our brethren in the United States of America. They carried the common law of England along with them, and jurisprudence is the department of human knowledge to which, as pointed out by Burke, they have chiefly devoted themselves, and in which they have chiefly excelled. Their two greatest legal luminaries are Chancellor KENT and Professor STORY. In Kent's Commentaries I find this passage: "No peculiar ceremonies are requisite by the common law" (he is speaking of the common law of England) "to the valid celebration of marriage; the consent of the parties is all that is required. If the contract be made *per verba de præsenti*, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and it is equally binding as if made *in facie ecclesiæ*. This is the doctrine of the common law, and also of the canon law which governed marriages in England prior to the Marriage Act; and the canon law is also the general law throughout Europe as to marriages, except where it has been

* 778 *altered." He then goes on to point out particular States, such as Maine and Massachusetts, in which particular regulations as to the form of contracting marriage are introduced by statute, but intimates that in the absence of positive statute, the common law of England, as he has expounded it, governs the marriage contract.

In Story's treatise "On the Conflict of Laws," he says: (c. 5) "The common law of England, like the late law existing in America, considers marriage in no other light than as a civil contract." He goes on to explain, that wherever particular forms are not required by positive statute, a complete marriage is constituted by the consent of the parties. There can be no doubt that this view of the common law of England has been constantly acted upon in every State of the American

Union; but we are now told that all parties who have thus contracted the matrimonial tie have been living together in a state of concubinage.

Now, my Lords, am I not justified in saying that the law upon this subject has long been considered settled by judicial decision? It is possible that some new discovery may have been made, and that all the eminent men whose opinions I have cited may have been in error. But how is this proved? If an express decision against the validity of such a marriage had been dug out from some obscure repository, I should have paid little attention to it against such a current of authority, and I should have treated it as I do the opinion of Mr. Justice BAYLEY, cited at the bar, that a marriage in Ireland between dissenters by a dissenting minister was void, because it was celebrated, not in a church, but in a private house. But from the earliest times, with the exception of **Foxcroft's* and *Del Heith's Cases*, hitherto allowed not to be law, there is no decision discovered to show that a marriage contracted by the parties with the intention of instantly entering into the state of wedlock is void, or is not attended with the incident of marriage of rendering the issue legitimate.

The counsel for the prisoner relied very much upon the general scope of the statutes respecting marriage, as showing that there can be no valid marriage without the intervention of a priest; and there is great reason to think that this notion was entertained by those who framed the Irish statutes making it highly penal for Roman Catholic priests to marry any except Roman Catholics, and to annul marriages celebrated by Roman Catholic priests unless both parties were Roman Catholics: although it cannot be said that upon a contrary supposition such statutes would be nugatory; for, whatever the law of the land may be, there are few who would enter into the conjugal state without the nuptial benediction from a priest; and the nullifying enactment would avoid the marriage unlawfully celebrated by a Catholic priest, even if at common law the parties might have contracted a valid marriage without any priest, Catholic or Protestant.

The statutes respecting precontracts *per verba de præsenti* do not seem to me by any means to show that there may not be *ipsum matrimonium* without the intervention of a priest; for I have already attempted to explain that there may be a contract *per verba de præsenti* which is not *ipsum matrimonium*, if the parties consider it executory, and do not mean to live together as man and wife till their marriage shall be subsequently solemnized in the face of the church. Con-

* 780 tracts *per verba de præsenti, subsequente copulâ*, * are exempted from the operation of the Acts, because cohabitation is supposed to be proof that they meant to contract present marriage, and persons who have so contracted are treated as married. But there is another class of statutes, entirely overlooked by the Judges, and which in my mind afford a strong argument against the necessity of the presence of a priest apostolically ordained to the constitution of a valid marriage; I allude to the statutes for removing doubts as to the validity of marriages where no such priest was present. These are declaratory Acts.

By the Irish Act, 21st & 22d Geo. 3, c. 25, marriages celebrated by dissenting ministers in Ireland between members of their own congregations are declared to be valid. These marriages were obviously, before the passing of the Act, in the same situation exactly as the marriage the validity of which we are now considering. At common law the validity of a marriage could in no degree depend upon the religious profession of the parties. By the Act of the Imperial Parliament, 58th Geo. 3, c. 84, marriages solemnized by Presbyterian ministers in the East Indies are declared to be valid; the law of marriage being the same in the East Indies as in Ireland. Further, by the Imperial Act, 4th Geo. 4, c. 91, marriages in a foreign country, celebrated by any chaplain or by any officer or other person appointed by the commander-in-chief, are declared to be valid. The common law of England with respect to marriage prevails within the lines of the English army abroad, and here you have a Parliamentary declaration that, according to the common law of England, a marriage by a layman was valid. I have always understood that, although a statute in form enactive is not necessarily

to be taken as introductory of a new law, a *de- *781
claratory law is a positive announcement by the
legislature that the law declared existed before the passing
of the statute, and shall have a retrospective operation, and
shall guide the decision of other cases similarly circumstanced
as the case the law of which is declared. These declaratory
statutes were cited at the bar, but they are not noticed by the
Lord Chief Justice TINDAL; and it would have been satisfac-
tory to have known how they were viewed by the Judges
who, "after considerable fluctuation and doubt, acceded to
the opinion of the majority."

There is another Act of Parliament on this subject, which
I humbly think is entitled to some consideration. By 32d
Geo. 3, c. 21 (Irish), Protestant dissenting ministers may
publish banns between a Protestant dissenter and a Roman
Catholic, and marry them, but are prohibited from celebrat-
ing marriage between a Roman Catholic and a member of
the Established Protestant Church; affording an inference
that a marriage by a dissenting minister, like a marriage by
a Roman Catholic priest, would be valid where not forbidden
by the legislature.

Much reliance has been placed on the statement that actions
for breach of promise of marriage have been maintained in
Ireland where there had been a *copula* after the promise;
and actions for seduction after a promise to marry, the
daughter being called as a witness; which it is said would
be, upon the doctrine contended for by the Crown, instances
of a wife being permitted to sue her husband, and to give
evidence against him in a Court of Justice. But, in coun-
tries where the canon law certainly prevails, it does not follow
that in every case marriage is necessarily constituted by a
copula following a promise to marry. To constitute
such a marriage there *must first be mutual promises *782
solemnly and sincerely entered into, and then there
must be a *copula* while these promises remain unreleased and
in force. Now the mere words indicating an intention to
marry, used in the course of soliciting chastity, not under-
stood to be serious, however culpable they may be, cannot
be construed into a binding contract to marry; and regard

must be had to the circumstances under which the *copula* takes place; for if the woman in surrendering her person is conscious that she is committing an act of fornication instead of consummating her marriage, the *copula* cannot be connected with any previous promise that has been made, and marriage is not thereby constituted. In examining all contracts you must look to the intention of the contracting parties, and there can be no binding contract without the parties intending to enter into it. In the cases referred to, it would probably be found that, according to the intention of the parties, the *copula* was not in performance of the promise; and that, if the female gave any credit to the promise, she did not think of then being made a wife, and still treated the promise as executory, to be performed at a future time by a marriage ceremony. It may well be admitted that in Ireland marriage was not usually constituted by such means, for it was not in the contemplation of the parties so to constitute it; but this will by no means show that marriage was not constituted by a ceremony which the parties intended and believed to constitute marriage, and after which they lived together as man and wife.

Then it is said that the Statute of Merton shows that the canon law respecting matrimony was never admitted into England. The Statute of Merton does not relate to
 * 783 the subject we are discussing; it settles * only who are to be legitimate, and determines that none shall be legitimate who are not born after the marriage of their parents; but it leaves the question of marriage untouched, and there is no inconsistency in supposing that marriage may be contracted according to the rules of the canon law, although the marriage of the parents after the birth of children may not render them legitimate. As a *reductio ad absurdum*, this case is put: "A. made a contract of marriage *per verba de præsenti* with B., and then in the lifetime of B. marries C. *in facie ecclesiæ*, and has children at the same time both by C. and B.; B. dies. Are the issues of both legitimate?" I have no difficulty in answering this question. If A. and B. by their contract meant to enter into instant marriage, and to live together as man and wife without waiting for any other

ceremony, the issue of B. are legitimate, and the issue of C. are bastards. On the other hand, if A. and B., though using words *de præsenti*, did not mean to become complete man and wife till a subsequent ceremony should be performed, and they afterwards came together without thereby meaning to consummate a marriage, a possible though not a probable supposition, their engagement resting merely in contract, and B. dying before a marriage was solemnized, the issue of C. would be legitimate: but no case is to be found in the books in which issue of parties who have contracted *per verba de præsenti* have been held illegitimate; indeed, in almost all those cases I believe it will be found that the parties never came together, and never meant to come together as man and wife, so that issue never appeared. It is easy to conceive that parties might contract *per verba de præsenti*, without meaning instantly to become man and wife. Such an engagement * was irrevocable; but there might well be * 784 an irrevocable engagement, although it was at the same time only executory. The distinction I have taken solves with equal facility the case put, “suppose two sons born at the same time, one from each mother, which is the eldest son and heir?”

But these difficulties are trifling compared to the difficulties to be encountered on the supposition that, by the common law, marriage could not be possibly constituted without the intervention of a priest episcopally ordained. What if the person who officiates as a priest, and is believed by the parties to be so, is no priest, and has never received orders of any kind? This question was suggested during the argument, but is not met by the Judges. *Mr. Pemberton* admitted at the bar, as according to the authorities he was bound to do, that the marriage would be valid. Lord STOWELL repeatedly expressed an opinion to this effect; and it turns out that in the instance of a *pseudo* parson, who about twenty years ago officiated as curate of St. Martin's-in-the-Fields, and during that time married many couples, upon the discovery of his being an impostor, which became a matter of great notoriety, no Act of Parliament passed to give validity to the marriages which he had solemnized; which could only

have arisen from the government of the day being convinced, after the best advice, that in themselves they were valid.

Indeed, that parties who have vowed eternal fidelity at the altar, and, having gone through all the forms which the Church and the State prescribe, have received the nuptial benediction from one whom they have every reason to believe was commissioned to pronounce it by a successor of the

holy apostles, should run the risk of finding that some
* 785 years after, * from the rector of the parish being imposed upon by a layman pretending to be a priest duly ordained, they are living in a state of concubinage and that their children are bastards, — is a supposition so monstrous that no one has ventured to lay down for law a doctrine which would lead to such consequences. But what becomes of the doctrine of the necessity of a priest in apostolical orders to the validity of marriage? The proposition must now be changed, that there must be present one believed by the parties to be a priest in apostolical orders; and a marriage by a layman may be good. There is a good marriage by a layman from the mistake of the parties, who thought that he was a priest with power to marry them. Does it not seem strange that at the same time a marriage should be void celebrated by a clergyman who is actually in Presbyterian orders, having been solemnly ordained by the imposition of hands according to the rites of his church, and who is believed by the parties to have sufficient authority by the law of God and man to join them in wedlock?

Here I must observe how little weight is to be given to what was gravely relied upon at the bar, the prevailing belief among mankind of the necessity of the presence of a priest at a valid marriage, as evinced by novelists and dramatists: for it will be found that these expounders of the law always make a marriage by a sham parson void, contrary to the opinion of Lord STOWELL and the canonists; and they give validity to marriages in masquerades, where the parties were entirely mistaken as to the persons with whom they are united; marriages which would hardly be supported in the Ecclesiastical Court, in a suit of jactitation, or for restitution of conjugal rights.

There is another case, not met by the learned * Judges, which essentially breaks in upon the rule * 786 they have laid down. It has been repeatedly held, and there can be no doubt that such is the law, that in circumstances where it is utterly impossible to procure the presence of a priest, there may be a valid marriage by the consent of the parties. Lord STOWELL has referred to the marriage between the first parents of mankind; and looking to a more modern case, which would be determined by the common law of England, I presume the learned Judges would not doubt, that in the recent settlement of Pitcairn's Island the descendants of the mutineers of the "Bounty" might lawfully have contracted marriage before they had been visited by a clergyman in episcopal orders. The necessity for the presence of such a clergyman must be qualified with the condition that his attendance may by possibility be procured. Again, the rule that marriage is void unless celebrated *per presbyterum sacris ordinibus constitutum*, is broken in upon by the admission that a marriage is valid if celebrated by a deacon, who is no more a presbyter than the parish clerk. A deacon is in orders, but not in priest's orders; and if the test of marriage be the question usually put by the temporal Courts to the bishop, on the plea of *ne unques accouples in loyal matrimonie*, where the marriage was celebrated by a deacon, the answer must have been in the negative; so that the widow would have lost her dower; and upon a writ of right by the son as heir, there must have been judgment against him on the ground that he was a bastard.

The Judges seem to intimate that a marriage by a deacon before the Reformation would have been bad, but that since the Reformation it is valid. I should like to know by what authority the change has been * brought about; * 787 Lord HARDWICKE's Act is silent upon the subject, and Parliament has in no shape interfered. Has the church authority to make such a change, with or without the consent of the Crown; and might it now be ordained by the Convocation that marriage may not be celebrated by a deacon, or that it may be celebrated by a parish clerk or a church-

warden? May the law of England, respecting a contract on which such important civil rights depend, be altered without the authority of Parliament? But if such a power does belong to the church, where is the canon by which it was exercised? All the canons passed since the time of Henry 8 are extant, as much as the Acts of Parliament, and no one is to be found alluding to such a subject. In the book of Common-prayer it is said that a deacon may baptize in the absence of the priest; it is silent as to his authority to marry, which seems always to have been considered one of his ordinary functions.

But I will now show that at common law there might have been a valid marriage by one not even in deacon's orders, and where no one was deceived, where there was no mistake by the parties. Till the 13th & 14th Car. 2, c. 4, § 14, there was no necessity for the clerk presented by the patron to a living being in orders of any sort, and he had a certain time after his admission to be ordained. There is an important case upon this point, not hitherto cited; *Costard v. Windet.* (a) One who was a mere doctor of the civil law, and never any spiritual person, was admitted to a benefice. Not having taken orders, he was afterwards deprived by a sentence declaratory *quia mere laicus*. A question arose

* 788 whether a lease * granted by him after his admission was valid. GAWDY, Justice, was at first of opinion that the lease was void, because upon the matter he was never incumbent; but Popham and Fenner contra, "for it would be mischievous if all the Acts by such averments should be drawn in question. And every one agreed that all spiritual acts, as marriages, &c., by such an one, during the time that he is parson, are good;" and so, with the assent of Gawdy, they resolved to adjudge it.

I must likewise observe that there might have been great difficulty in determining what kind of priest is a good priest to celebrate a marriage; the test being, not whether he be a clergyman of the Established Church, but whether he has been ordained by a bishop. Is a priest of the Greek Church

(a) Cro. Eliz. 775.

sufficient? or of the Christian church of Abyssinia? or of the Lutheran Church, which maintains episcopacy in Denmark and Sweden, while in other countries it is governed by a consistory of ecclesiastics, by whom orders are conferred? Upon a question of the validity of a marriage by a priest of a foreign church, by whom and on what principle, between the time of the Reformation and the passing of Lord HARDWICKE'S Act, would the sufficiency of his orders have been tried? Before the Reformation there would have been no difficulty, for the only orders recognized would have been those of the Church of Rome; but that test cannot now be applied, as a priest ordained by an English Protestant bishop would not be competent, for there is no reciprocity between the Church of Rome and the Church of England on this subject; as English episcopalian orders are not recognized by the Church of Rome, and a clergyman of the Church of England conforming to the Church of Rome must be re-ordained by a Roman Catholic bishop. Although * 789 now no orders are recognized by the Church of England except those conferred by a bishop, there seems for some time after the Reformation to have been considerable laxity upon this subject. It would appear that clergymen ordained by foreign churches which had laid aside episcopacy were admitted into English benefices without being re-ordained. Dr. Whittingham, who had been ordained by the Swiss clergy, and never by a bishop, was appointed Dean of Durham, and held the office many years, till he died. Archbishop Grindall, in 1582, issued a license to Mr. John Morrison, stating that as he had been ordained to sacred orders and the holy ministry five years before, in the kingdom of Scotland, by the imposition of hands, according to the laudable forms and rites of the reformed church of Scotland, "We, therefore, as much as in us lies and as by right we may, approving and ratifying the form of your ordination as aforesaid, grant unto you a license and faculty that in such orders by you taken, you may have power, throughout the whole province of Canterbury, to celebrate divine offices, to minister the sacraments," &c. Would a marriage celebrated

by Dr. Whittingham or by Mr. Morrison, in the reign of Elizabeth, have been held void?

It is remarkable that in the Act of Uniformity (section 15) there is a provision "that the Penalties in this Act shall not extend to the Foreigners or Aliens of the Foreign Reformed Churches, allowed or to be allowed by the King's Majesty, his heirs, or successors, in England." Suppose that Charles the 2d had allowed, as he might have done, clergymen of the church of Geneva to officiate in England, would marriages by them have been void because they had not been episcopally ordained? Such clergymen could
 * 790 * not have been recognized as priests when the common law took its origin; nor any clergy not allowed by the pope.

The question again arises, by what authority a new class of persons, viz., Protestant clergymen, disclaimed by the pope, are permitted to celebrate a valid marriage, who could not have done so at the common law, and there having been no statute to alter the law upon the subject? Is not the solution of the difficulty this, that at the common law the interposition of a priest was not necessary to the validity of the marriage for civil purposes, although the church, treating marriage as a sacrament, from time to time varied the forms which it declared necessary to constitute a regular marriage such as the church would entirely approve?

I now come to a difficulty met, I confess, boldly by the Judges; the consideration of the marriages of Quakers, which we are now told are all invalid, because not contracted before a priest episcopally ordained. I admit that this consequence follows inevitably from the doctrine contended for, and that the validity of these marriages is a complete test of that doctrine. They are left by Lord HARDWICKE'S Act as they were at common law; and they cannot be good at common law, if the presence of a priest episcopally ordained was necessary to the validity of marriage. I must observe, with great deference to my noble and learned friend, (a) that it

(a) Lord ABINGER, who had left the House.

never has been thought till to-day that that Act gave any validity to Quakers' marriages which Quakers' marriages had not at common law ; for it merely excepts those marriages from the operation of the Act, and leaves them as it found them. I will by and by cite the clause ; it treats them exactly like marriages in Scotland.

* THE LORD CHANCELLOR. — What I understood the * 791 noble and learned Lord to state was to adopt in substance the statement of the Chief Justice, who says, " Since the passing of the Marriage Act it has generally been supposed that the exception contained therein as to the marriages of Quakers and Jews amounted to a tacit acknowledgment by the legislature, that a marriage solemnized with the religious ceremonies which they were respectively known to adopt ought to be considered sufficient ; but before the passing of that Act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage on the ground that it was a marriage by a contract *per verba de præsenti*, but, on the contrary, the inference is strong that they were never considered legal."

LORD CAMPBELL. — That is exactly as I view it, — that it is a tacit acknowledgment that the marriages were valid.

THE LORD CHANCELLOR. — I do not think that my noble and learned friend meant to say more than merely to adopt that statement. If he were present I should leave him to speak for himself, but that is the way I understood it.

LORD CAMPBELL. — He seemed to draw a line of distinction between Quaker marriages before Lord HARDWICKE's Marriage Act, and since.

LORD BROUGHAM. — So I understood it.

LORD CAMPBELL. — But is not the 18th section of 26th Geo. 2, c. 33, a legislative declaration that such marriages, if con-

tracted so that the parties intended they should constitute the relation of husband and wife, were valid before * 792 the Act passed, and should * continue valid? The words are, "That nothing in this Act contained shall extend to that part of Great Britain called Scotland, nor to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion, respectively, nor to any marriage solemnized beyond the seas." Marriages were valid in Scotland before the passing of the Act without the intervention of a priest in orders, and so they were to continue.

The sect of Quakers had existed in England for 150 years before the Marriage Act passed. They did not recognize any order of priesthood, and they had contracted marriage by a ceremony which took place only among members of their own persuasion. They would have considered it sinful to be married in a church, or to have been united by a clergyman. They would have submitted to any penalty or punishment, rather than submit to the ceremony of marriage prescribed by the Church of England. They could not be brought under the operation of the new Act. What was the intention of the legislature respecting their past and future condition? Was it meant that they should be considered as then all living in concubinage, their children being all illegitimate; and that they should be incapable of entering into lawful wedlock in all time to come? If there had been then any grave doubt as to the validity of their marriages entered into according to their own forms, would there not have been an enactment giving validity to such marriages? As to the taking of oaths in Courts of Justice, a matter of much less consequence, relief had long before been afforded to them.

The Statute 6 & 7 Will. 3, c. 6, when properly examined, I think * 793 * furnishes strong evidence to show that these were legal marriages. The Act is "for granting to his Majesty certain rates and duties upon marriages, births, and burials." Quakers marrying are expressly subjected to the duty. In one place the marriage between them is called

a pretended marriage ; but by this uncivil expression was it intended to declare that the marriage was void, and to levy a tax upon concubinage ? On the contrary, it is declared that “any such marriage or pretended marriage shall be of the same force and nature as if the Act had not been made.” The tax is imposed on any other persons who should cohabit and live together as man and wife, — affording a strong evidence that marriage was then constituted by cohabitation and living together as man and wife.

In 1661, a marriage between Quakers according to their own ceremonies was held valid at Nisi Prius in an action of ejectment, and the ruling appears to have been acquiesced in. (a) The casual doubt imputed to Lord HALE, when he directed a case to be made as to the validity of a Quaker marriage, can be entitled to no weight.

Since the Marriage Act in 1753, down to the present day, Quakers, many of them men not only of great wealth but highly educated, not only distinguished for literature and science, but eminent lawyers, and ladies, not only of the strictest virtue and the most refined delicacy, but of the most brilliant talents and accomplishments, have contracted marriage according to the forms of their religion, without the most distant suspicion that in doing so they were violating the law of God or of man. I confess I should like to know whether all the Judges who have concurred in the opinion that a marriage is void by the common * law if * 794 not celebrated in the presence of a priest in episcopal orders, are of opinion that all Quakers, male and female, cohabiting as man and wife, are living in a state of concubinage, and that all the children of all Quakers are illegitimate ?

Till this controversy began by a note of the editor of a new edition of an obscure law book, I believe that the validity of the marriage of Quakers had not been questioned. Quakers have maintained actions for criminal conversation, where direct proof of a valid marriage is to be given. *Dean*

(a) 1 Hagg. Cons. Rep. App. 9.

v. Thomas, (a) Harford v. Morris. (b) Widowers and widows, being Quakers, and the children of Quakers, have received administration in the Ecclesiastical Courts; and in cases of intestacy have succeeded to personal property according to the Statute of Distributions. In tracing a title to real property, no objection has ever been made on the ground that it had been in a Quaker family, and no doubt has existed that the eldest son of a Quaker marriage would take by descent lands of which his father died seised in fee-simple. I cannot help thinking that such a general understanding and such a long course of acting greatly outweigh any nice scruples that may now be raised upon the subject.

Most of these observations apply, if possible, with greater strength respecting the marriages of Jews. It was utterly impossible that Jews ever could have been married by the intervention of a Christian priest. In every country where they have inhabited, they have been allowed to marry according to their own rites and ceremonies, and marriages so contracted have been held valid. Jews were banished * 795 from this country from the time of Edw. 1 till the time of Oliver Cromwell; but then they were permitted to settle, and they did settle, in England in considerable numbers. They have married here according to their own rites and ceremonies, and their marriages so contracted have undoubtedly been considered valid. Did the Marriage Act mean again to banish them from England, or to prevent them from entering into the married state? It is said they were considered as foreigners. There can be no doubt that when born in England, they are in all respects British subjects. But suppose they were aliens: aliens can only contract marriage in England according to the law of England; and if by that law the presence of a priest episcopally ordained were necessary to the due constitution of marriage, without the presence of such a priest marriage could not be lawfully constituted between any aliens in England. Therefore, the moment it is allowed that in England a marriage contracted

(a) 1 Moo. & M. 361.

(b) 1 Hagg. Cons. Rep. App. 9.

by Jews according to their own rites and ceremonies is valid, the doctrine is gone that by the common law the presence of a priest episcopally ordained was necessary to the due constitution of marriage. Although the Lord Chief Justice intimates his opinion that Quaker marriages are void, he does not say the same of the marriages of Jews; and I think it is impossible that he should, after the express decisions on the subject.

There is the case of *Andreas v. Andreas*, in the Consistory Court in 1737, before Dr. HENCHMAN. That was a suit by a wife against her husband for the restitution of conjugal rights. The parties were both Jews, and the libel alleged that they were married according to the forms of the Jewish nation. Objection was made that as they had not been married by a * priest in orders, the marriage was void, and the * 796 Court could take no notice of it. The Court was of opinion, however, that as the parties had contracted such a marriage as would bind them according to the Jewish forms, the woman was entitled to a remedy, and that the proceeding would well lie, and admitted the libel. Again, in the case of *Vigevana v. Alvarez*, (a) in the Prerogative Court in 1794, before Sir WILLIAM WYNNE; the libel pleaded a marriage between Jews, according to the rites and ceremonies of the Jewish religion. It was objected that the libel was bad upon the face of it, and ought to be rejected; for that persons coming before the Ecclesiastical Court to claim any right by marriage, must show the marriage to have been according to the rites and ceremonies of the church Christian; for which *Haydon v. Gould* was cited. Sir W. WYNNE said, that if a Jew were called upon to prove his marriage, the mode of proof must have been conformable to the Jewish rites; particularly since the Marriage Act, which lays down the law of this country as to marriages, with an exception for Jews and Quakers. That is a solemn adjudication upon the validity of such marriages. Here the allegation being that the parties were married according to the rites of the Jewish church, the Court thought that the libel ought to be admitted; as if the

(a) 1 Hagg. Cons. Rep. App. 7.

allegation was proved, a valid marriage was constituted. In *Lindo v. Belisario*, (a) which first came before Sir W. Scott in the Consistory Court of London, and then before Sir W. WYNNE in the Court of Arches, a Jewish marriage was set aside because the ceremonies prescribed by the Jewish law had not been duly observed, although words amount-
 * 797 ing to a contract *per verba de præsenti* * had passed between the parties; but if those ceremonies had been duly observed, the marriage would unquestionably have been held valid, although no Christian priest was present at it. *Lindo v. Belisario* was cited to show that even among the Jews mere *verba de præsenti* will not make marriage without the religious ceremony. This only illustrates what I have tried to explain, that the contract *per verba de præsenti* only constitutes marriage when the parties intended that it should do so without any subsequent ceremony; but that when a subsequent ceremony is necessary to the completion of the marriage, the *verba de præsenti* only operate as an executory contract.

I ought to observe that the language of the legislature in 6 & 7 Will. 4, c. 85, § 2, regulating the marriage of Quakers and Jews in future, is, in my opinion, very strong to show that their past marriages were valid: "That the Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and solemnize marriages, according to the usages of the said society and of the said persons respectively, and every such marriage is hereby declared and confirmed good in law," &c., "provided that notice to the registrar shall have been given," &c. A new condition is imposed, and that being observed, the parties continuing to contract and solemnize marriage as before, every such marriage is declared and confirmed good in law. It comes to this, then, that marriages of Jews and Quakers, excepted from Lord HARDWICKE's Act, are valid at common law, and prove that at common law there might be a marriage without the intervention of a priest in episcopal orders.

In some parts of the Lord Chief Justice's opinion, he in-

(a) 1 Hagg. Cons. Rep. 216, and App. 7.

timates that the condition required for the validity
* of a marriage is only that there should be a religious * 798
ceremony performed on the occasion. However becoming and desirable it may be that a relation of such deep importance should be contracted in the manner the most solemn and impressive, and that the blessing of heaven should be invoked on those entering into it, I cannot find that any religious ceremony has been considered necessary to its validity. But supposing the sound doctrine to be that some religious ceremony upon the occasion is indispensable, I think it would deserve great consideration whether the religious ceremony which the parties consider the most sacred should not be deemed sufficient. Before the Reformation, when there was a religious ceremony, it was celebrated by a priest recognized as in orders by the church of Rome. Since the Reformation, among members of the church of England, it has been celebrated by a priest whom the church of Rome would consider a mere layman. Among Protestant dissenters in England down to the Marriage Act, and in Ireland down to the present time, the religious ceremony has been celebrated by a priest, not episcopally ordained, but ordained by the imposition of the hands of those who had been themselves so ordained, and whom they consider duly commissioned to preach the Gospel of Jesus Christ, and to administer the sacraments of his holy religion; although by the Church of England he is considered only as a layman. The question is, whether this priest might not as effectually perform the religious ceremony required by the common law, as the priest who would have been regarded as a layman by the church which was dominant when the common law took its origin, and for many centuries after.

For these reasons, my Lords, I have arrived at
* the clear conclusion that the marriage between the * 799
prisoner and Hester Graham was a valid marriage.
Had I regarded the question as originally more doubtful, I should have thought it right to adhere to decisions by which the law has been considered settled for half a century. On questions of property it has often been said that it is the duty of a Judge to support decisions which have been some time

acquiesced in, and which have been acted upon, even if he would not have concurred in them when they were pronounced, lest titles should be shaken. Does not this rule apply with infinitely greater force to questions of *status*, and most of all to questions respecting marriage, on which the happiness of individuals and the welfare of society so essentially depend? Consider the consequences of now holding that by the common law a valid marriage cannot be contracted without the presence of a priest episcopally ordained. I do not suppose that as yet it is intended to impeach marriages in Scotland on this ground, but hundreds of thousands of marriages which have taken place in Ireland since the time of James 1, and the validity of which had never been doubted, are now asserted to have been null. In England, the marriages of all Quakers and Jews, and of all persons who before the Marriage Act may have been married by Presbyterian or other dissenting ministers, are also asserted to have been null. And do not let it be supposed that the evil is confined to the members of those sects, with whom there might be less sympathy; but the members of the Established Church may be deprived of most valuable rights of property by the invalidity of such marriages.

When we consider our extensive colonies in every
 * 800 quarter of the globe, where the common law of * England respecting marriage prevails, the confusion and dismay will be still greater. Vast numbers of marriages have been celebrated in the East Indies and elsewhere by Presbyterian and missionary ministers of various persuasions, under circumstances in which no validating statute would apply to them: and where the attendance of a minister of religion could not be procured, many marriages have taken place without any scruple of the parties, or their parents or relatives, before consuls, military officers, magistrates, and captains of ships. As to the past, we may resort to the clumsy expedient of *ex post facto* legislation, and enact that all those marriages shall be as valid and effectual as if they had been celebrated by a priest in episcopal orders; but what are you to do for the future? The common law in its wisdom accommodates itself with respect to marriage to the varying

circumstances in which the parties may be placed. By statute you must have rigid rules, to be strictly complied with. Such rules have been wisely framed by the last Marriage Act for England, which proceeds on the principle that marriage is a civil contract to be accompanied by a religious ceremony, unless the parties are so absurd and perverted in their understandings that they object to a religious ceremony; in which case (which I rejoice to think has been very rare) the religious ceremony has been dispensed with. But the framing of a similar Act for Ireland, which shall give satisfaction to the Established Church, to the Roman Catholic priesthood and population, and to the Presbyterians and other Protestant dissenters, with the necessary machinery for notice, license, and registration, I am afraid will be found a task very difficult for any government to accomplish. Then what * prospective provisions are to be made for mar- * 801 riages between British subjects in the colonies, in pagan countries, and on the wide ocean? May you not be driven to enact that the ancient canon law, which Lord STOWELL, as it is now said, erroneously supposed to have been the common law of England, shall be taken to be the law of England wherever it has not been altered by positive statutes; and thus reduce things to the quiet and satisfactory state in which they were before this controversy arose?

But a wiser and more salutary course will be for your Lordships judicially to decide that, according to the opinion of Lord STOWELL, the marriage is valid, and all legislation on the subject may be unnecessary. No one can feel more strongly than I do the embarrassment of coming to such a decision against the unanimous opinion of the English Judges whom you have consulted; but it is my duty to remind your Lordships, that, paying all due deference to that opinion, you are not bound by it. By the constitution of the country, judgment is to be given on this writ of error by your Lordships; you consult the Judges only to assist you in coming to a right judgment, and you are to be governed by their opinion only in as far as you are persuaded by the reasons on which it is founded. Your Lordships have repeatedly reversed unanimous decisions of the fifteen Judges of Scotland,

on points of Scottish law ; and I myself have several times heard Lord ELDON quote with approbation a saying, that a decision of the majority, where there was a difference of opinion on the Bench, with the reasons of all the Judges on both sides of the question, was more to be regarded than the unanimous decision of the whole, pronounced by a single

* 802 Judge, — which raised in his mind a suspicion * that some might have compromised their opinion, who might have doubted, and who, had they reduced their thoughts into writing, not only might have confirmed themselves in the views originally taken by them, but might have brought over the majority. The unanimous opinion of the English Judges on questions of English law has likewise several times been overruled by this House. If I am to be governed by the authority of great names, I must say, with all respect for the distinguished magistrates now adorning the Bench, I cannot place them higher than their predecessors, Lord HOLT, Mr. Justice GOULD, Mr. Justice POWIS, Mr. Justice POWELL, Lord KENYON, Lord ELLENBOROUGH, Lord Chief Justice GIBBS, Lord WYNFORD, Lord TENTERDEN, and Lord STOWELL.

It is a great consolation to me to find that the name of my noble and learned friend, the present Chief Justice of England, is to be added to this illustrious list.

Lord BROUGHAM stated that Lord DENMAN concurred with Lord CAMPBELL and himself on this subject ; but hoped that the noble and learned Lord, who was then on circuit, would be able to attend to give his reasons in person.

LORD CAMPBELL. — Your Lordships should likewise bear in mind, that two of the common-law Judges, Mr. Justice COLTMAN and Mr. Justice WIGHTMAN, have not expressed any opinion upon the question ; and that the two Judges of the Ecclesiastical Courts, who are Privy Councillors, and might have been summoned by your Lordships (who would have been peculiarly well qualified to assist you on such a question), might have adhered to the doctrine upon marriage, which has uniformly prevailed in Doctors' Commons from the most remote times to the present hour.

* Supposing the first marriage to be valid, that the * 803 prisoner was "married" within the meaning of 10 Geo. 4, c. 34, and so guilty of bigamy by marrying again, I cannot doubt for one moment; and my opinion would have been the same if the second marriage had been exactly in the same form as the first, instead of being in a church according to the rites and ceremonies of the Church of England. How can this be considered a mere executory contract not intended to operate as marriage till publicly solemnized, when the parties were actually married by a minister of religion, who they believed had power to marry them, and after receiving the nuptial benediction from him lived together as husband and wife?

I must therefore very humbly advise your Lordships to reverse the judgment of the Court of Queen's Bench in Ireland, and to give judgment for the Crown.

THE LORD CHANCELLOR. — The course I should propose to your Lordships is, to postpone the further consideration of this case. With respect to the proposition which has been made by my noble and learned friend (*a*) for calling in the assistance of the Judges of the Ecclesiastical Court, I doubt very much whether it would be consistent with the forms of this House. I presume that the suggestion is founded upon what is stated by the Lord Chief Justice in his judgment, that as far as related to the ecclesiastical part of the question, the learned Judges had not been able to give that attention to the subject which they were desirous of giving, and which they would have given under other circumstances. I am afraid that the utmost that could be done, would be to hear * civilians at the bar. I doubt whether we can * 804 take the advice of civilians. From what the learned Chief Justice says, speaking of the ecclesiastical law, (*b*) it is quite obvious that the Judges feel that they had not had sufficient time to consider, with the attention and care they would have desired to give, this very important part of the subject.

(*a*) Lord BROUGHAM, *ante*, p. 742.

(*b*) *Ante*, pp. 654, 678, 679.

LORD BROUGHAM. — I am quite aware of the difficulty to which my noble and learned friend refers. My suggestion was grounded upon the ancient practice of this House having the attendance of Privy Councillors. It is not as Judges of the Ecclesiastical Court that I proposed their assistance being obtained, but as Privy Councillors, which the learned Judges of that Court always are ; but it requires a further consideration, and I only throw it out as a suggestion.

LORD CAMPBELL. — In Mr. Macqueen's book it is stated (*a*) that Privy Councillors used to attend to assist the House in judicial matters ; and I apprehend that the Judges of the Ecclesiastical Courts, who are Privy Councillors, would have been able in this case to render your Lordships valuable assistance. But, however, this may be made the subject of future consideration. I shall not oppose further argument, although I am now prepared to decide the first marriage to be valid, and to give judgment for the Crown.

The further consideration of the cause was postponed.

August 11, 1843.

LORD DENMAN. — In approaching this great subject, I wish, in the first place, to declare my entire concurrence
 * 805 * with those who think that this Court of Error ought to give a judgment upon the question which is brought before them. Whatever the law is, I think it ought to be ascertained and declared. The consequences are of immense importance to individuals, inasmuch as the present decision acquits the prisoner of bigamy, by assuming that she with whom he first contracted marriage is not his wife, but his concubine, and all their children illegitimate. In prosecutions of this nature both marriages are under discussion ; and it is often not more desirable for the first wife to prove that she holds that relation, and enjoys the rights which flow from it, than it is for the second wife to be released from the tie into which she has been entrapped. But this judgment annuls

(*a*) Page 671 *et seq.*

the first contract, to the disgrace and prejudice of the female, and fixes the second, to the end of life, upon one who might probably be happy to escape from it.

The more general consequences of this decision are important to an extent which cannot be calculated. It will affect all marriages contracted by British subjects in foreign countries where no municipal laws prevail, on the high seas, and many in our own colonies, as well as the discussion of all marriages which may have been contracted in this country before the Marriage Act. Probably some of these may yet become the subject of controversy in the Courts of Law; and all, in my opinion, ought to be decided by the law as it now stands,—not disposed of by some sweeping legislative enactment, varying the legal rights and permanent interests of thousands who cannot be heard in their own behalf.

After what has taken place in this cause, the subject itself must be confessed to be full of difficulty,—a difficulty greatly increased by the respect and admiration * which * 806 we have habitually felt for the learning and attainments of the Irish Judges. Yet I cannot claim the praise of courage in scrutinizing what they have laid down, for to decline that task would be to abdicate the functions of a Court of Error. The single duty of such a Court is, to enter freely into the examination of what it is called to review, with reference only to the correctness of the reasoning and the validity of the judgment, admitting no other influence from the authority of the former tribunal than the necessity of canvassing all its proceedings with caution, deference, and distrust of ourselves, when we may discover grounds for dissent. This course I have pursued: I carefully studied as well the arguments in the Court of Queen's Bench in Dublin, as the judgments which were pronounced upon them; I heard the able discussion at the bar of this House, and have since attentively read the notes of it, and I came to my conclusion with no other hesitation in my own mind than what was produced by the feelings to which I have alluded; and I am now compelled to declare my conviction that the opinion delivered by the majority of those able Judges is not conformable to the law of England.

The great mistake (if I may so express myself without offence) which appears to me to have been committed is, that of reversing the order of proof. The burden has been supposed to lie upon those who assert that a marriage may be lawful without the intervention of a priest. Now, I most confidently maintain that marriage, being a civil contract flowing from the natural law, must be taken as lawful till some enactment which annuls it can be produced and proved by those who deny its lawfulness. This mistake (as * 807 I think) pervades, in a still more striking * manner, the opinions of those learned Judges who have been consulted by your Lordships. The contract is lawful in its nature ; its language is plain ; it is entered into by parties competent to contract ; surely, then, it must bind those parties to the extent of the stipulation, unless there is some enactment that it shall not bind them. I can see no difference in this respect between marriage and any other lawful contract. Surely it behoves those who say there is such an enactment to point it out distinctly, and to show where it exists ; and if it does not exist *in specie*, then to give the clearest proof, by conclusive reasoning on collateral circumstances, that it has been acted upon as a law. All will admit that marriage *de facto* may be vitiated by non-compliance with such a law, and that possibly the law may be traced in the history of society, though nowhere to be found in words and sentences. It may be inferred from decisions and authorities, and from the text-writers on the subject. We only require that it should be so inferred by the deduction of clear reason.

We must next inquire what is the proposition to be proved ? Not merely (as I submit) that the church has desired and directed that such and such solemnities shall attend the contract of marriage, but that the want of them is fatal to the contract. It is not enough that there should be strong requirements that the forms must be observed, strong censures upon the impropriety and irregularity of informal marriages, but there must be declarations of their illegality. Illegal in one sense they must be admitted to be, if they depart from the circumstances which the law prescribes. But the question is on

the substance, not on the details. These may be wrong, as not entirely conformable with the law; and yet the law may give full * effect to the contract as to the * 808 civil rights and *status* of the parties. Therefore, I look not to exhortations, denunciations, reproachful names cast on certain marriages and married persons by men of the church, but I look for some authority promulgating the consequences that are said to attach to a marriage not solemnized as the church prescribes. I cannot affirm that it is in point of fact void, till I clearly discern the law which avoids it.

The first document referred to is as early as the second century, the letter of Pope Evaristus to the bishops of Africa, as showing what was the law of the church upon that subject. He denounces, he exhorts, he condemns. He says all these marriages are *stupra, adulteria, contubernia*. He deprecates them in the most earnest language, and urges the faithful by every consideration to abstain from them; but, with all his vehement desire to dissuade from secret marriages, he never once employs that argument which, if just, would have supplied the most powerful motive against contracting them. He neither affects to annul them by his own authority nor refers to the law as doing so already. He utters a passionate remonstrance, but never threatens the offending parties with the nullity of their clandestine contract. Could he have overlooked a nullifying law, if such had been in force? But, my Lords, I go further still: I say that the very evil condemned is, that marriages so contracted were binding; however irregular and sinful in their manner, they, being once made, were lawful.

A constitution of Archbishop Lanfranc, in the year 1076, has been quoted in the course of the argument, for the same purpose as this letter of Pope Evaristus. It was little touched upon in the Court of Queen's Bench in Ireland; but *Mr. Pemberton* * brought forward a trans- * 809 lation, which I think rather a free one, approaching nearer to the consequence of nullity than the original words; which might, possibly, be properly construed to pronounce such a marriage sinful, but not declare it void. But supposing Lanfranc to have issued a constitution in the eleventh

century for annulling all marriages not contracted in the presence of a priest, did that become, and did it continue, the law of England, in the face of those decretals of Pope Gregory mentioned yesterday in the argument of my noble and learned friend? Could it be the law in force at the time when the Synod of Exeter, in 1270, condemned a secret first marriage, because persons ignorant of it may be entrapped into a second marriage, which would be void by reason of the first? The first marriage is there stated to be objectionable only because it was clandestine, and so might lead to impose the consequences of concubinage and illegitimacy upon the wife and offspring of a second marriage.

Again, in the fifteenth century Archbishop Bouchier inveighs against the same evil. He requires solemnity and publicity in marriages, to save innocent and unsuspecting persons from contracting them with those already made man and wife by a clandestine union. The purport is, let certain forms attend the marriage, and ensure the registration of it, so that its existence may be notorious to all. Applying his enactment to the facts of the present case, he would condemn the prisoner for not marrying his first wife in the face of the church, because he was thereby enabled to induce the second wife to yield to his embraces; but still more for solemnizing the second marriage, which, in spite of its solemnity, he considered void, because it came too late after a marriage,

* 810 * which, however irregular, created the conjugal relation between the parties. If Lanfranc's constitution had been the law, it is impossible that either of those decrees should have appeared in the thirteenth and the fifteenth centuries. They demonstrate to my mind, that in point of fact the church held the marriage good which was complete as a marriage contract, though not celebrated by a priest.

If the law of the church was thus deficient, the municipal laws referred to as the laws of King Edmund are equally so. They also prescribe what shall be done, though most imperfectly; they require the presence at the ceremony of a mass-priest; a description not very intelligible, but explained as meaning a priest in holy orders, *presbyterum sacris ordinibus constitutum*. This priest is not required to take any part in

the proceedings. This is quite consistent with the supposition that the want of notoriety was the evil to be remedied, and that the remedy would be found in the presence of the most respectable neighbour to attest it, and of one belonging to the only lettered class by whom it might be recorded, but hard to reconcile with the notion that a religious rite was essential to the validity of the contract.

If such was the case by the prevailing law of the land at any period, how has it been changed? That it has not operation now, is admitted on all hands; for though the language of pleading requires *presbyterum sacris ordinibus constitutum*, the competency of a deacon to perform the ceremony is now universally acknowledged; yet a deacon is no more a priest than is the teacher of any dissenting congregation. The same remark applies to marriages celebrated by some impostor officiating as a clergyman without any right to that character; these have been frequently declared * valid * 811 and binding. There is no middle class between priest and no priest; every one must be the one or the other. We are therefore fully warranted in maintaining that if at any time the law required the presence of a priest, that law in early times was abrogated or became obsolete: but it seems to me more rational to infer that the presence of the priest, however desirable for many obvious advantages, was never made necessary.

If it should be said that a deacon is respected as a minister of religion, and that his intromission may supply the absence of a priest, because the conscience of the parties would be affected in the same manner; I answer, that the Presbyterian minister in Ireland might for the same reason be substituted; and, indeed, that the conscience of a Christian would tell him that he is equally bound by such a promise, whether it be or be not environed by a religious ceremony.

If previously to these constitutions and decrees marriage had been a thing prohibited by law, and requiring to be licensed by a legal sanction, or if it had been a newly-discovered species of contract, which the ruling powers thought likely to be beneficial, and therefore determined upon introducing, there might be strong reason for throwing the burden of proof

on those who assert the validity of the marriage. The creatures of positive law can only exist in the form in which that law created them ; but the institution of marriage is older than any law ; it may be said to exist by the common law of all mankind, subject to all the varying forms which expediency may dictate, and to any consequences that legislation may attach to the neglect of them ; but subject to those alone. Nothing in the Old Testament requires the presence of a priest at a marriage ; nothing in the New.

* 812 * In the early times of Christianity we have no trace of proof that the priestly benediction or presence was required : up to the period of the Council of Trent, marriages might be contracted throughout Christendom without the intervention of a priest. Then, if the want of that intervention has, by some positive enactment, the effect of annulling the marriage, and if that legislative Act cannot be produced, if no account can be given of its date, or the occasion of its passing, or the authority by which it was established, but I am to infer its existence from a variety of circumstances collected from loose language and equivocal appearances, — I must first call attention to the extreme improbability that a proceeding of such immense importance should be left to such an uncertain mode of proof, instead of being promulgated with as much distinctness as the ordinance of the Council of Trent, or our own Clandestine-Marriage Act of 1753. But, secondly, I must entreat your Lordships to consider how many obvious reasons there are to induce humane and considerate men to pause before they would attach the pain of nullity to irregularly contracted marriages. The husband would most commonly be responsible for the irregularity ; but it is the husband who generally seeks to release himself from the matrimonial obligation. The wrong-doer would be enabled to take advantage of his own wrong, and, for the purpose of indulging in a career of vicious propensity, to sacrifice the rights, the interests, and the honour of those to whom he is bound by the strongest ties which nature and justice can impose.

Besides, in the early stages of society the attendance of a priest might in various cases be impossible, or it might be

refused from personal and unworthy motives, which even the church would strongly condemn in its minister. Can we believe that the power of marrying should be left entirely to his caprice, or to the accidental circumstances which might permit or forbid him to visit the district where the parties dwelt? Is it not much easier to believe, and much more respectful to the church to believe, that while it would issue directory instructions as to the course it required the faithful to pursue, and might even pronounce its censures on any who neglected them, it would yet long pause and deliberate before it assisted parties to take advantage of the defect to nullify their own marriage contract?

Looking to the most ancient authorities among the text-writers on general law, I find them frequently declaring that the contract is completed by the act of the parties alone, — a strong, direct proof that no law of nullity was known in their time, and a challenge to the makers of such a law to proclaim its passing. The opposite opinion of other writers is of much less weight, because their proposition did not rest on opinion, but on positive enactment, that might at once, if it existed, be pointed out. The opinions of learned men on our law are so nearly balanced, that I doubt whether there is any one of the passages that has been quoted against the validity of these marriages, which might not with equal plausibility be so construed as to arrange itself on the other side of the argument. Perkins's learned work puts forward some particular propositions, from which it has been inferred that by the old law of England marriages without the intervention of a priest were no marriages. But he states that the law applicable to the case had in his time undergone alteration. How came it to be altered? How unsettled and varying the law here supposed! How unlike the distinctness and force

* requisite for a severe penal enactment! That which * 814 was the law in the time of Queen Elizabeth must have been the law in the time of Henry 3. We accept his admission that such was not the law in the latter reign, but we also deny that it was such in the former. The case in the Year Books, upon which his first opinion was founded, clearly does

not support it. I took the pains to translate that case as the argument proceeded, and the learned counsel perceived that Perkins had mistaken its import. No man now contends for it.

Some cases are, however, cited to prove the necessity for a priest's presence at a marriage. Foxcroft's is the first. But does it make out the proposition? It proves that the presence of no less a priest than the Bishop of London was not sufficient. If the decision is correct, the marriage must have been vitiated for some other circumstance, and those that accompanied the marriage were no doubt singular. Another of these decisions was *Del Heith's Case*, in which no priest but the parish priest was held sufficient to solemnize a marriage. These decisions are evidently of no value, because they prove too much. So also in modern times, when *Scrimshire v. Scrimshire* (a) was decided by Sir E. SIMPSON against a marriage celebrated by a Roman Catholic priest, he committed an error now condemned by the unanimous voice of all lawyers. These are manifestly worthless decisions, and we shall vainly attempt to select from them any sound principle.

Most of the other cases appearing in our later reports may be employed by ingenuity on either side. Such is * 815 *Bunting v. Lepingwell*. (b) I feel that neither * party can claim it as conclusive. It was very carefully sifted yesterday, with some fresh light thrown upon it by a more correct translation of the Latin record. I do not think it necessary to comment more largely on the facts; but it suggests the remark, that another fallacy appears to have insinuated itself into the argument, with reference to the meaning of those weighty words, "a contract *per verba de præsenti*." They seem to have been taken to import a present agreement to marry at a future time, and not an agreement presently executed, whereby the parties declared themselves man and wife at that very moment. If the former meaning should prevail, we all allow that it could only found a right to sue for completion of the contract, or for damages on breach of the promise; but the latter is, beyond all dispute, the true

(a) 2 Hagg. Cons. R. 395.

(b) 4 Co. Rep. 29; Moor, 169.

meaning ; and thus the question recurs, Wherefore is not this executed contract what it purports to be ?

So much reliance has been placed on one authority that I cannot excuse myself from a full consideration of it ; it is a case supposed to be stated as law by Lord HALE, and appears in a note to Coke upon Littleton. (a) The case was this : A. entered into a contract of marriage with B. ; A. then actually married in church another person ; then B. compelled A. to perform the marriage ceremony with B. by sentence of the Court. A., the husband, in the mean time between the sentence and the solemnization, had conveyed away his land by *per fraudem mediate*, during the time of the excommunication which he had incurred by disobeying the sentence. The Court of Common Pleas had held, that on the death of A., the wife to whom * he had first contracted himself, * 816 and whom he had been thereupon compelled to marry by sentence of the Spiritual Court, was entitled to her dower out of the lands which he had alienated during that interval. From the judgment of the Common Pleas an appeal was preferred before some Court bearing the style and title "*Coram Rege et Concilio*," and the judgment is there said to have been reversed ; and by the appellate jurisdiction the wife was held to be thus cheated out of her dower.

Now, first, on the nature of the points decided, it appears to me that the opinion of the inferior Court was sound and just, and that the opposite doctrine upon its own face condemns itself. It is to me perfectly clear that the marriage solemnized between A. and B. in the face of the church had relation to the time of the contract, and set up that contract as binding from that time. It could not otherwise supersede the later marriage performed in the face of the church and with all its forms, nor render illegitimate the children of such later marriage. That this was its operation is proved by the quotation of Lord Chief Justice TINDAL, from Rolle's Abridgment, where it is said that a divorce by reason of precontract bastardizes the subsequent issue. Then, by the principle of relation, all things stood in the same position, as to the rights

(a) 83 a, n. (10).

of the several parties at the time of the solemnization, which they had occupied at the period of the contract; and whatever rights the wife at that time enjoyed over her husband's land, she must have retained at that of the solemnization. It seems to follow as a consequence, or, rather, to be the self-same proposition, that by alienating the land at a subsequent period, the husband could defeat no right of hers to
 * 817 dower; and this is the more strikingly true * because fraud is found as a fact in the case. Another peculiarity belongs to the transaction which formed the subject of that antiquated lawsuit: the husband was actually excommunicated at the time of alienating; that is, he was in a condition in which a man is disabled from performing any act whatever, or entering into any of the ordinary transactions of life; yet this his act was permitted to be available for the very purpose of getting rid of an obligation clearly created against him, in favour of his wife, by a contract afterwards carried into effect through the medium of that very sentence of excommunication.

Observations alone upon a case we may think insufficient to destroy its authority, if emanating from a jurisdiction known to the law and constitution of the country; but from what Court does this extraordinary judgment come? "*Coram Rege et Concilio*" has been said to describe a Court of very high authority, composed of some of the eminent officers of state and Judges; but on looking at Lord HALE's Treatise on the Jurisdiction of this House, I find that such Court is not the only one indicated by the title just mentioned. There are many. One of them should seem to be this very House of Parliament, which is now in deliberation on the law there laid down; if, indeed, this House had in the time of Edward 1 a separate existence. "Sometimes," says Lord HALE, "we shall find, and that very often, that the style '*Coram Nobis et Concilio*,' generally, in Parliament time, is intended of the Lords' House, as appears by the precedents thereof in the writs of the King or petitions of error in both Houses."

Now, I must inquire what knowledge we possess of the judicial proceedings of the Lords' House, or of the
 * 818 Parliament, in the reign of Edward 1? * Are we

sufficiently aware of the principle on which they acted; whether they held themselves bound by law, or thought it right to resort to some notions of equity, or, finally, assumed the freedom of disposing *pro re natâ*, according to the circumstances of families, of the interest of their several members? Whether they professed to apply the law, or to do equity, or to confer favours, we may believe that individual canvassing or powerful influence might not be altogether excluded from their minds; and this may account for the fact which is stated to me, that, except this single and most questionable decision, not a judgment or a *dictum* of that Court, whatever it may have been, is reported in any one of our books. That case is, however, supposed to derive great authority from the adoption of Lord HALE. Now, what is the adoption of Lord HALE? We are informed, in the preface to the thirteenth edition of Coke upon Littleton, which was commenced by Mr. Hargrave, and brought to its conclusion by Mr. Butler, that the notes there appearing “were transcribed from a copy of Lord HALE’s manuscript notes in the margin of Coke upon Littleton, presented by Lord HALE” to a gentleman named. The utmost effect, then, that can be given to the note in question is, that it may have been copied out by Lord HALE from some old work not now in existence, and the result of it summed up by him in few words. How does that import any approbation by Lord HALE of the doctrine? How do I know but that he set it down for the sake of contraverting and refuting it? That is a much more probable reason for his copying it out, when we recollect his known opinions upon the general subject, and his little disposition to approve of the triumph of fraud on any occasion. No man who ever lived was less *likely to * 819 have gone out of his way to maintain a doctrine so full of doubt, both in law and morals, in a judgment subverting that of the Court of Law in which he himself for a time administered justice. Even if Lord HALE, meditating in his study on ancient and abstruse dogmas, had at the time when he copied the case an impression that it was rightly decided, we ought not to be blinded by our deference to so great a name, and yield up our own reason to every sug-

gestion of another's mind. This is a duty of the first importance which we owe to our own position. We have lately heard much of the distinction between the *obiter dicta* that may fall from a Judge in the course of a judicial argument, and the principles on which he himself rests the conclusion at which he arrives. But what is merely written by a Judge in his closet is not even an *obiter dictum*. If for any one of the great judicial characters of England this authority could be claimed, Lord HALE would assuredly be that man; but I am most confident that he would have repudiated the claim for himself. One of his warmest admirers, himself an eminent Judge and a most useful writer on the law, Sir MICHAEL FOSTER, actually published, among his famous Discourses, "Observations on some Passages in the Writings of Lord HALE," tending to expose mistakes in those passages. He accounts for those mistakes in his preface to his work on Crown Law, (a) by the imperfect state in which the manuscript was left. He observes, "The author's last thoughts were suppressed; and one may venture to say for him, now he cannot speak for himself, that the Summary, a collection of extracts hastily put together at different times and in the hurry of a public employ, — mere hints for private
 * 820 use, though thrown * into some method, and for the most part placed under proper heads (as his collections upon every subject generally were), — was never intended for the press, nor fitted for it; and that the history itself was not intended by him for public view in the dress in which it now appeareth." But this manuscript marginal note is open to all the objections here enumerated, and more; it is not made part of any treatise, nor thrown under any general head, nor accompanied with any one indication that it agreed with his own opinion at any period of his life. Let me illustrate this remark: it frequently happens that the different members of the same Court derive different impressions from the argument of counsel; they meet to consult, and the most convenient method, perhaps, of testing their opinions is for each to write his own, and afterwards compare them all. The

(a) Page xxi.

most ordinary result is, that one view is adopted by all, and announced as the unanimous opinion of the Court; and the other, on mature reflection, is deliberately rejected as untenable. Let me now suppose that the opinions of the majority were not recorded in our reports, and that the rejected one, written by a Judge, finds its way from his portfolio to future ages; that rejected opinion would have far more appearance of judicial authority than this manuscript sentence of Lord HALE.

This very long discussion of the manuscript note will, I trust, be forgiven for the importance which has been assigned to it. I have endeavoured to show that it is wrong in principle, deficient in authority, unwarrantably asserted as a judicial opinion, even if shown to represent that of Lord HALE; but wholly denuded of proof that it ever was that great man's opinion; the contrary being far more probable. Yet that rotten case is the corner-stone of the argument * which has been up to this time successful in * 821 the cause now abiding your Lordships' determination.

I pass on to the modern authorities. Their uniform current does not indeed commence in very modern times; the doctrine for which I contend having been broached by NOY, when he was Attorney-General, and being stated as the law by a commission appointed by the Long Parliament in 1644, comprising lawyers of very great authority. These eminent men do not appear as inventors of a doctrine so often taught before, but as the reporters of it from the civil law. They must have received it from their predecessors, as they handed it down to still more eminent members of our profession. Lord HALE, according to my view, adopted it at *Nisi Prius*, and so earned the vituperation of Roger North. His deliberate opinion we have in his life recorded by Burnet, and his general views went along with it. It is proved, to my entire conviction, to have been the opinion of Lord HOLT, the opinion of Chief Baron COMYN, the opinion of Lord HARDWICKE, of Mr. Justice BLACKSTONE, of Lord MANSFIELD, of Lord KENYON, of Sir VICARY GIBBS, of Lord ELLENBOROUGH, of Lord TENTERDEN, and of Lord WYNFORD. Now I believe I have mentioned eleven names of the very highest rank in reputation, all of

whom appear to me to have taken it for granted, without one dissentient voice, without one single doubt, that a solemn contract of marriage executed *per verba de præsenti* does in fact constitute a marriage. This is proved to have been Lord HARDWICKE's opinion by the Marriage Act itself; and the same proof applies to Lord MANSFIELD, who is supposed, nevertheless, to have held the contrary doctrine, from his speech in recommending that Act to the House of Commons.

* 822 Supposing that speech correctly reported, * we should not forget that he was then endeavouring to conciliate a very strong and much exasperated enemy, and wished to smooth the way as much as possible to the conclusion. But after he had been above a quarter of a century upon the Bench, we have the doctrine laid down by him, in the case of *Morton v. Fenn*, (a) in exact conformity with the principle I have sought to establish. Blackstone avowed this opinion in his inestimable Commentaries, immediately after the passing of that Act. Is Lord TENTERDEN to be considered as rash and violent? One of the most learned and reflecting of Judges, in whose mind, as we all remember, caution was the quality, perhaps, which held undue predominance. Called upon, in the course of the trial of *Beer v. Ward*, (b) to decide upon the validity of a marriage before the Marriage Act, he did not shrink from directing the jury in the same manner in which his illustrious predecessors would undoubtedly have directed them; and this was a second trial, so that he knew beforehand that the point would arise. The issue was raised by the Court of Chancery, and he knew that his opinion would be reviewed by Lord ELDON's acuteness and sagacity. "The law of England, as I understand it," says Lord TENTERDEN, "was, that *per verba de præsenti*, followed by cohabitation, was *ipsum matrimonium*." The cohabitation is universally known to make no difference in this matter, yet I do not think the word was introduced by inadvertence; I rather ascribe it to that caution which led him to reject no circumstance that tended in the smallest degree to countenance his decision in each particular case. But the general doc-

(a) 3 Doug. 211, Rosc. n. ed.

(b) MS.

trine that a contract *per verba de præsenti*, though
 * without the intervention of a priest, was a valid mar- * 823
 riage, he states to have been the old law of England
 as he understood it. I apprehend that Lord TENTERDEN did
 understand the law of England, and had as good a right to
 give a confident opinion upon it as any of the most distin-
 guished men who have at any time appeared in Westminster
 Hall.

Your Lordships naturally anticipate my reference to an
 authority greater, if possible, than all of these, though mainly
 founded upon the deference justly felt to be due to the earlier
 among them. I need but name it, because no man of educa-
 tion, or possessing those literary habits that indicate a gentle-
 man and a scholar, no one endowed with a liberal curiosity
 on general matters of the most interesting research, can be
 ignorant of Lord STOWELL's judgment in the case of *Dalrym-*
ple v. Dalrymple. (a) Lord STOWELL there goes through the
 whole of the authorities, and gives a judgment which never
 can be forgotten, or read without the highest admiration;
 but its principal value consists in the clearness of his argu-
 ment and the conclusiveness of his reasoning. Little did I
 expect that it could ever be my task to defend this remark-
 able judgment, now for the first time questioned and repu-
 diated in England. The leading objection to the assertion of
 its principal doctrine, that it was extrajudicial, I beg leave,
 with my noble and learned friend, entirely to dispute. I
 think it is strictly and properly judicial. It is the reason-
 ing upon which he saw that his judgment must be founded,
 and upon which his mind must have been completely satis-
 fied before he reached his conclusion. Did he possess the
 knowledge and experience requisite for discerning
 the * propositions which were necessary for his argu- * 824
 ment? He spoke on that department of the law with
 which he had been for half a century perfectly familiar, which
 he had studied from his youth, and was daily applying in his
 manhood and old age.

But he is boldly charged with the mistake of supposing

(a) 2 Hagg. Cons. Rep. 54.

that the canon law prevailed in England, whereas we know that by the Statute of Merton the canon law was rejected. Are we really to believe that Lord STOWELL was ignorant of the Statute of Merton ; or can we fail to perceive that in declaring the canon law to have prevailed in England, he was not speaking of the whole body of the canon law, but of that part which applies to the subject-matter of his judgment, the law of the marriage contract? That a subsequent marriage was never permitted in this country to legitimate children previously born, he well knew ; but that the canon law was the law of England with reference to the mode of contracting marriage (the question before him), not only does Lord STOWELL distinctly affirm, but Lord ELDON, in the case of *Walker v. M'Adam*, (a) goes along with him to the full extent. Nor was he taken by surprise or led unawares into a declaration of his opinion, having professed the same in *Lindo v. Belisario*, (b) near twenty years before.

Another circumstance was urged in the Court at Dublin, as detracting from the weight of Lord STOWELL's judgment : it seems that he did not know all that is known now ; recent discoveries have brought to light new matters of law and history, with which it was his misfortune to be unacquainted. It is even surmised that a different opinion might have been expected from him, if the whole truth had been before
 * 825 him. It * is to be lamented that these treasures are not pointed out to our attention. I find no new fact, but that the old Saxon laws have been lately printed by order of the Record Commissioners. But the substance of all that is now put forward, — the letters of popes, decretals, constitutions, Saxon concilia, — all these are things with which Lord STOWELL was conversant from his academic days. Whatever materials they supplied for a contrary decision were assuredly then urged with zeal and ability by the learned civilians at Doctors' Commons, and by the advocates who conducted Miss Manners's appeal before the Court of Delegates. I well remember the sensation excited by that remarkable composition, the admiration that it excited, and the value that was

(a) 1 Dow, 148.

(b) 1 Hagg. Cons. Rep. 216.

attached to it. Lord Chief Justice GIBBS and the whole Court of Common Pleas had a speedy opportunity of declaring their adhesion ; so has every Judge of every Court, when the point has come under discussion. Considering the circumspection, the sagacity, the practical wisdom of that great master of the law of marriage, his love of order and discipline, his habitual desire to uphold the controlling power of the church ; considering, too, the decisions of common-law authority by which it was both preceded and followed, I feel that that doctrine cannot be rejected without undermining the whole fabric of judicial authority.

I turn to another document which commands my highest respect, — the opinion laid before your Lordships by the Judges whom you consulted. To the well-considered opinion of these excellent persons I am so much in the habit of deferring, I feel for them such true regard and attachment, that I cannot differ from them without pain. The language of apology would be misplaced ; it is superseded by the just * sense of a higher duty. I feel the sentiment * 826 so eloquently expressed by Mr. Burke, who said, on an occasion not indeed very similar, but where he perhaps was no less tempted to surrender what he thought right to his deference for other persons, — after descanting at Bristol on what a representative ought to do for his constituents, he proceeds : “ But his unbiassed opinion, his matured judgment, his enlightened conscience, he cannot sacrifice to you, or to any man, or any set of men ; these he does not derive from your pleasure, no, nor even from the law and the constitution ; these are a trust from Providence, and for the abuse of these he is deeply responsible.” With a sense of that weighty responsibility, I am bound not implicitly to abide by the conclusion, but to examine the premises upon which it rests. I have done so with care, and I find no reason to alter the opinion I had formed. If I have been at all successful in what I have had the honour of submitting to your Lordships, some of the arguments there employed have already received some answer.

These narrow limits of time preclude my touching particularly on each matter brought to bear on the question, in the

opinion delivered by my Lord Chief Justice; and a whole life would be inadequate to a full discussion of all the points stirred in it. My noble and learned friends have dealt with some of these particulars. I may venture to say that I have not conclusively formed my opinion without weighing them all.

I think the exercise of jurisdiction by the Spiritual Court in these matters is fully explained by the single fact, that mankind in general have wished to sanction the most important of all their temporal concerns by religious * 827 solemnities. The same feeling even now * prompts the new-married couple in Scotland to request their minister's presence and benediction, and in this country calls in the clergyman to read the service of the church over a contract expressly made perfect by the law without his attendance.

Some religious ceremony was for these reasons found almost uniformly to accompany the contract; but where it was not so accompanied, it was still confessedly binding, for it was often made the foundation of a proceeding in the Court Christian, to have it publicly solemnized in the face of the church. On this and on other occasions, the spiritual authorities may have refused to assist the parties without the performance of a marriage regular in the minutest point of ritual observance; yet there is nothing to show that the legal power either of church or state annulled a marriage contract for the want of them.

It does not appear that much reasonable argument can be drawn from the language applied, either in reports of cases or in treatises, to particular stages of the marriage contract. Contract, espousals, marriage, matrimony, are words carelessly employed in ancient times. I do not find a single passage in the writings of Lord COKE or any of our old English text-writers which points to nullity as arising from the absence of a priest. The supposed clashing of two marriages, as an argument *ab inconvenienti*, seems to me to assume, in every instance, the point to be proved. The various suppositions made are, in my opinion, neither more nor less than a reiterated *petitio principii*.

The mention of a priest, a ring, a ceremony, in some of the cases, proves no more to me than the desire of the parties there interested in upholding the marriage to throw away no circumstance which any one might think conducive to establish it; but all and * each of those circumstances * 828 might possibly be of importance to the decision, as evidence of the intention of the parties. Of this disposition we see constant examples, and one was just now observed upon in the conduct of so consummate and experienced a minister of the law as Lord TENTERDEN.

In the remark that no marriage has been held good in our Courts where a priest has not intervened, I think the whole fallacy of the argument may be detected. It plainly shows that the question was not regarded in the only manner which I deem consistent with a just view of the case; for I have shown what strike my mind as strong reasons for thinking that there is no presumption of the necessity of a priest to make a marriage good; but the marriage is good, as being in itself a complete contract, unless the absence of a priest is clearly shown to invalidate the marriage by force of some intelligible law. I certainly feel a consolation in coming to this opinion, from seeing, in the statement of Lord Chief Justice TINDAL, that the Judges had determined the cause in some haste, and that there was much fluctuation in the minds of my learned brethren. I know personally that other impressions had been at first made on some; and confess the utmost difficulty in discovering by what logic their doubts were removed. In furtherance of that statement I may mention, that when differences to a certain degree had existed, the learned Judges appointed a meeting to consider and decide upon them; and that meeting certainly had a very short duration. How any conversion was effected might have been made apparent to your Lordships if each Judge had separately laid his own views before you, or even if you had been informed of those reasons, at least, in which there was an unanimous * acquiescence. We, then, who are un- * 829 happily compelled to differ from the majority of the Judges, are relieved from the pain of condemning (as some of your Lordships' predecessors have done) judicial advice

deliberately resolved upon and uniformly adhered to by the whole body, for reasons approved by all. But the document from which we dissent has not undergone all the consideration that would have been desirable; it has been adopted after much fluctuation of opinion, and is not, as far as we know, supported by a single reason which all unite in thinking just.

I find it impossible to trouble your Lordships more at length, though many other topics might have been urged in favour of my conclusion. One is, indeed, of so much weight in my mind that I cannot pass it over in silence,—the clause relating to Quakers' marriages, in Lord HARDWICKE's Act of 1753. That clause, clearly contemplating those marriages as good, contracted, as they notoriously were, without a priest, seems to me to prove the undoubted opinion of the legislature, acting under the guidance of that great lawyer and Judge, that such marriages were valid and binding. To this argument I have seen no answer attempted.

Upon the whole, I am most clearly of opinion, that a contract *per verba de præsenti* was, before that Act passed, by the English law a good marriage, *ipsum matrimonium*. From the ground which I have taken, I cannot descend to any thing like a compromise on the principle that *communis error facit jus*; on the supposition that there may be error in the judicial opinion hitherto prevailing, but that it has been committed by so many persons of the highest authority, that it ought now to be sanctioned by a legislative declaration.

*830 I think there is no error in that opinion, * no proof whatever that the church would at any time have hesitated to enforce this contract, or to consider it as a marriage for every purpose. I do not believe that any bishop, in those early times when he was the proper officer to certify whether parties were married or not, or whether the issue were legitimate or not, would have done his duty if he had refused to certify that such a marriage was valid, and the offspring legitimate. It seems to me, that if there has been such a *communis error*, it is not the opinion of the great lawyers and Judges who have been named, but the vulgar notion current in the world confounding solemnization by a priest

with the marriage contract, to which it gave at once authenticity and respectability. The prevalence of that notion is explained by the practice, and has laid hold of the public mind from that propensity to take for granted, which we have so often seen leading to wrong conclusions. In spite of it, however, the judicial mind of England has now for ages held with equal tenacity the opposite faith, not reported in cases (for the prudent usages of men rendered them almost impossible), but from an enlightened consideration of the nature of the contract.

A single word more is necessary with reference to the proceeding which has brought this case before your Lordships. It arises in a trial for bigamy; and we are to consider whether the first marriage was good, so as to expose him who contracted it, and afterwards contracted a second, to the punishment assigned by the law to that crime. A doubt was thrown out from high authority, whether the offending party was himself aware that his marriage was good in law, and whether it might not be good for other purposes, yet not for the purpose of making * him a criminal by contracting an- * 831 other. I am of opinion that such considerations ought to find no place in this or any Court of Law. If the first marriage be good for any purpose, it is good for the purpose of rendering him, who commits the vicious and cruel act of deserting one wife and deceiving another woman by the pretence of a marriage, a criminal in the eye of the law. The offender takes his chance whether his first contract will be held a marriage, and whether his second will be held a crime; and, not more ignorant of the consequences than many other offenders, he must abide by them.

Whenever this question may call for our decision, I shall feel myself compelled to declare my opinion that the prisoner was duly convicted, and that the judgment of the Court of Queen's Bench in Ireland is erroneous.

The case was again adjourned for further consideration.

February 23, 1844.

THE LORD CHANCELLOR. — This, my Lords, is a question of
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so much importance, embracing such a variety of considerations, and affecting such deep and extensive interests, that I have thought it right, agreeably to the course pursued by my noble and learned friends, to state my opinion upon it in writing; and with your permission I will read it to your Lordships.

The first and material point for consideration in this case is, as to the effect by the law of England, previous to the Marriage Act, of a contract or engagement of matrimony *per verba de præsenti*; by which I understand a contract of

* 832 present marriage, for that is the sense in which these words are used in all the * text-writers and reports of decisions upon the subject. “Spousals *de præsenti*,”

Swinburne says, “are a mutual promise or contract of present matrimony; as when the man doth say to the woman, ‘I do take thee to my wife;’ and she then answereth, ‘I do take thee to my husband.’”

Such a contract entered into between a man and a woman was indissoluble; the parties could not by mutual consent release each other from the obligation. Either party might, by a suit in the Spiritual Court, compel the other to solemnize the marriage *in facie ecclesiæ*. It was so much a marriage, that if they cohabited together before solemnization, they could not be proceeded against for fornication, but merely for a contempt. If either of them cohabited with another person, the parties might be proceeded against for adultery. The contract was considered to be of the essence of matrimony, and was therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law *verum matrimonium*, and sometimes *ipsum matrimonium*. Another and most important effect of such a contract was, that if either of the parties afterwards married with another person, solemnizing the same *in facie ecclesiæ*, such marriage might be set aside, even after cohabitation and the birth of children, and the parties compelled to solemnize the first marriage *in facie ecclesiæ*. Such were the effects of a contract of marriage *per verba de præsenti*.

A contract of marriage *per verba de futuro*, that is, a contract for future marriage, might be released, and the Court

would not compel, in opposition to the will of either of the parties, solemnization *in facie ecclesiæ*, though in this case the party refusing to perform the contract might be punished *propter læsionem fidei*. But in the case of a contract of this nature, if it were * followed by cohabitation, it was * 833 then put upon the same footing as a contract *per verba de præsenti*, and was followed by the same consequences.

At present, however, I am directing your Lordships' attention to a contract of marriage *per verba de præsenti*, and its legal consequences and effects. They are such as I have already stated, and the authorities upon this subject will upon examination be found to be uniform and consistent.

I shall, in support of this statement, refer in the first instance to Swinburne, in his Treatise of Spousals. The writer lived in the reign of Queen Elizabeth, and was for several years a Judge of the Prerogative Court at York. This treatise is a work of great learning, though tinged with the quaintness so common with the writers of that period. Lord STOWELL makes constant reference to his authority. Swinburne says, "That woman and that man which have contracted spousals *de præsenti* cannot by any agreement dissolve those spousals, but are reputed for very husband and wife, in respect of the substance and indissoluble knot of matrimony; and therefore, if either of them should in fact proceed to solemnize matrimony with any other person, consummating the same by carnal copulation and the procreation of children, this matrimony is to be dissolved as unlawful, the parties marrying to be punished as adulterers, and their issue in danger of bastardy. The reason is, because here is no promise of any future act, but a present and perfect consent, the which alone maketh matrimony, without either public solemnization or carnal copulation; for neither is the one nor the other the essence of matrimony, but consent only. The ecclesiastical laws do usually give to women betrothed only or affianced the name and title of wife; because in truth the man and woman, * thus per- * 834 fectly assured by words of present time, are husband and wife before God and his church."

In another passage he expresses himself thus: "Spousals

de præsenti, though not consummate, be in truth and substance very matrimony, and therefore perpetually indissoluble, except for adultery." Again he says, "The parties having contracted spousals *de præsenti*, albeit the one party should afterwards marry another person in the face of the church, and consummate the same by carnal copulation, notwithstanding, the first contract is good, and shall prevail against the second marriage."

In a subsequent passage he points out the mode of proceeding, "by the laws ecclesiastical of this realm, where a party having contracted spousals *de præsenti*, should afterwards refuse to undergo the holy bond of matrimony."

In the case of *Dalrymple v. Dalrymple*, (a) so often referred to, and never without just praise, Lord STOWELL, the most learned ecclesiastical lawyer of his age, expresses himself in accordance with the opinions of Swinburne, whose work he cites, and whose authority he sanctions: "The consent of two parties, expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of *sponsalia per verba de præsenti*; improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonies of marriage. The expression, however, was constantly used, in succeeding times, to signify clandestine marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; sec-

* 835 ondly, to mere * engagements for a future marriage, which were termed *sponsalia per verba de futuro*; a distinction of *sponsalia* not at all known to the Roman civil law. Different rules, relative to their respective effects in point of legal consequence, applied to these three cases of regular marriages, of irregular marriages, and of mere promises or engagements. In the regular marriage every thing was presumed to be complete and consummated, both in substance and in ceremony; in the irregular marriage every thing was presumed to be complete in substance, but not in ceremony, and the ceremony was enjoined to be undergone

(a) 2 Hagg. Cons. Rep. 54.

as matter of order; in the promise, or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony. Mutual consent would relieve the parties from their engagement, and one party, without the consent of the other, might contract a valid marriage, regular or irregular, with another person." In a subsequent passage he states that "this country disclaimed, amongst other opinions of the Romish church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin, and as well on that account as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony; but it likewise retained those rules of the canon law which had their foundation, not in the sacrament or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognizance of matrimonial causes, enforced these rules; and, among others, that rule which held an irregular marriage constituted *per verba de præsenti*, not followed by any consummation shown, valid to the full extent of voiding a subsequent regular marriage contracted * with * 836 another person. The same doctrine," he adds, "is recognized by the Temporal Courts as the existing rule of the matrimonial law of this country;" and he cites *Bunting's Case* in support of this position.

In these passages Lord STOWELL is speaking of the ecclesiastical law of England. No man knew better than he did what that law was, and upon what it was founded. When he mentions the canon law, he must obviously mean that portion of the canon law received here, and which forms so considerable a part of the ecclesiastical law of this country. It is impossible to suppose that he should for a moment have lost sight of this distinction.

The same doctrine was stated by Sir EDWARD SIMPSON in his judgment in *Scrimshire v. Scrimshire*, (a) pronounced in the year 1752, shortly before the passing of the Marriage Act. His words are these: "The canon law received here

(a) 2 Hagg. Cons. Rep. 395.

calls an absolute contract *ipsum matrimonium*, and will enforce solemnization according to English rites."

Another authority to the same effect is that of Doctor Ayliffe, the learned author of the *Parergon*. He states that "the ancient canon law received in this realm is the law of the kingdom in ecclesiastical cases, if it be not repugnant to the royal prerogative, or to the customs, laws, and statutes of the realm." There is in his work a chapter "on Marriage or Matrimony, otherwise called Wedlock." He there speaks of "spousals *de præsenti*, commonly called marriage." "The principal thing," he says, "required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a marriage. The Council * 837 of Trent," he adds, "declares *all clandestine marriages to be null and void; but this is not law in England, our law only punishing such marriages with the censure of the church."

In strict conformity with these opinions is the language of Lord HOLT in the case of *Jesson v. Collins*, (a) which has given occasion to so much observation. A suit had been instituted in the Ecclesiastical Court to dissolve a marriage by reason of a precontract *per verba de præsenti*. A prohibition was moved for, upon a suggestion that the contract was *per verba de futuro*, for the breach of which damages might be recovered at common law. But HOLT, Chief Justice, observed in answer, that "though it was *per verba de futuro*, it was a matrimonial matter, and the Spiritual Court had jurisdiction." In the course of his judgment he stated, as it was very natural for him to do, the distinction between such a contract and a contract *per verba de præsenti*. "The latter," he said, "was a marriage; viz., I marry you; You and I are man and wife; and this is not releasable. *Per verba de futuro*, I will marry you; I promise to marry you; &c.; which do not intimate an actual marriage, but refer it to a future act; and this is releasable; and as it is releasable, the party may admit the breach, and demand satisfaction." It cannot, I think, be justly said that he went out of his way

(a) 2 Salk. 437; 6 Mod. 155.

in making these observations. A distinction had been taken between a contract *per verba de præsenti* and a contract *per verba de futuro*, and the ground taken for moving for the prohibition was, that the proper remedy in the latter case was by an action for damages.

In the subsequent case, viz., *Wigmore's Case*, (a)
 * the wife sued in the Spiritual Court for alimony. * 838
 The husband was an Anabaptist, and had a license to marry, but married the woman according to the forms of their own religion. "*Et per* HOLT, Chief Justice: by the canon law, a contract *per verba de præsenti* is a marriage; as, I take you to be my wife; so it is of a contract *per verba de futuro*, viz., I will take, &c. If the contract be executed, and he does take her, it is a marriage, and they," that is, the Spiritual Court, "cannot punish for fornication."

We have the high authority, therefore, of this learned and eminent Judge, in accordance with the ecclesiastical authorities to which I have referred; and it is added that the other Judges of the Court concurred in the opinion expressed by the Chief Justice. It has been supposed that Lord HOLT was speaking of marriage contracts, not with reference to the ecclesiastical law of this country, but to the general canon law, because in *Wigmore's Case* he used the expression, "by the canon law." Undoubtedly he did so, but by that expression he could only have meant the canon law received here, and forming part of the ecclesiastical law of this kingdom. It is quite obvious that his observations would have been perfectly irrelevant (a circumstance very unusual with this distinguished Judge) if the expressions were used in any other sense. I cannot, therefore, accede to this explanation. And why are we to put a forced construction upon his words, when they merely express an opinion relating to the ecclesiastical law, in accordance with the most eminent authorities in this branch of jurisprudence, upon a subject peculiarly belonging to their jurisdiction?

The only remaining authority to which I think it necessary at present to refer, is that of Mr. Justice * BLACK- * 839

(a) 2 Salk. 438.

STONE, who states, in the first book of his Commentaries (p. 439), that “any contract made *per verba de præsenti*, or in words of the present time, between persons able to contract, was, before the late Act, deemed a valid marriage to many purposes, and the parties might be compelled in the Spiritual Courts to celebrate it *in facie ecclesiæ*.” It is obvious that the learned commentator considered this statement of the law of marriage as free from all doubt, for he did not think it necessary to cite any authority in support of the position. These Commentaries passed through several editions in the lifetime of the learned author, but no change was made in the passage to which I have referred. I think your Lordships will be of opinion that these references, which might, if necessary, be greatly extended, sufficiently establish what I have stated as to the nature and effect of a contract of marriage *per verba de præsenti*, and in opposition to which, I conceive, no authority has been or can be adduced.

There is one branch of this subject which I have already mentioned, but to which I must more particularly advert, because it connects itself closely, as I shall hereafter have occasion to show, with the main question before your Lordships; namely, the judgment that has been pronounced in this case by the Court of Queen’s Bench in Ireland. I have stated that a contract *per verba de præsenti* may be enforced against either of the parties to it, although such party may have subsequently been married *in facie ecclesiæ* to another person, and even after consummation and the birth of children. This is abundantly clear from the Statute 32 Hen. 8, c. 38, which recites, that “Whereas, heretofore divers and many persons, after long continuance together in matrimony,

without any allegation of either of the parties or any

* 840 other, at their * marriage, why the same should not be

good, just, and lawful, and after the same matrimony solemnized and consummated, and sometimes with fruit of children, have, nevertheless, by an unjust law of the bishop of Rome, upon pretence of a former contract made and not consummated, been divorced and separated, contrary to God’s law; and so the true matrimony, both solemnized in the face of the church and consummated, and confirmed also with fruit

of children, clearly frustrated and dissolved." The statute, therefore, proceeds to enact, "That such marriage, being contract, and solemnized in the face of the church, and consummated with bodily knowledge or fruit of children, shall be deemed, judged, and taken to be lawful, good, just, and indissoluble, notwithstanding any precontract or precontracts of matrimony not consummated with bodily knowledge, which either of the parties so married, or both, shall have made with any other person or persons before the time of contracting such marriage."

This law was pointed against the injustice of dissolving by reason of precontract a marriage solemnized *in facie ecclesie*, and after consummation between the parties; but it left the law, where there had been no consummation, as it stood before. Great dissatisfaction appears to have been occasioned by this change, and very early in the reign of Edward 6 the statute was repealed, and the law restored to its former state.

Bunting's Case, (a) which has been referred to on both sides in the argument, is an instance of the application of the general rule. This was an action of trespass, and upon a special verdict it was found that John Bunting had contracted marriage *per verba de * præsenti* with Agnes * 841 Adingsel, and that afterwards Agnes was married to one Twede, and cohabited with him. Bunting sued Agnes in the Court of Audience, and proved the contract, and sentence was pronounced that she should marry Bunting, which she did. They had issue Charles Bunting, and afterwards the father died. The jury found, that if Charles was the son and heir of Bunting, the defendant was guilty of the trespass. The main questions were these: It was contended that there should have been a sentence of divorce, and that the husband ought to have been a party to the suit; but the Court decided that the sentence against the wife only, being but declaratory, was good, and should bind the husband *de facto*; and that as to the other point, the Court must give faith and credit to the proceeding and sentence of the Eccle-

(a) *Bunting v. Lepingwell*, 4 Rep. 29; Moor, 169.

siastical Court, to which the cognizance of the subject of marriage belongs. In this case, then, the effect of a precontract *per verba de præsenti* upon a subsequent regular marriage *in facie ecclesiæ*, which this is stated to have been, was admitted and sanctioned by the Court of Common Law, for it was resolved that the plaintiff was legitimate, and no bastard.

I place little reliance upon the terms of the decree of the Spiritual Court, as recited in the special verdict; for, as they do not correspond with the usual form in similar cases, it is probable that the substance only is stated, and that, too, in the language of the pleader.

I have been furnished, by the kindness and industry of Mr. Hope, with a case of a similar nature, extracted from the rolls of the province of York, in which the sentence is set forth in the usual and regular form. The suit, which is of ancient date

(in the fourteenth century), is thus entitled: *Cecilia*
* 842 *de Portynton* versus * *John de Steinbergh* and *Alicia*

Cristyndome, “quam idem Johannes de facto duxit in uxorem.” The libel charged that the said John and Alicia contracted a marriage *de facto*, and solemnized the same in the face of the church. Then follows this allegation, that the said marriage does not and cannot subsist *de jure*, by reason of a precontract, *cum copula*, between the said John and Cecilia. It therefore prays the marriage *de facto* between John and Alicia may be pronounced to have been and to be (*fuisse et esse*) null and void, and that the said John may be adjudged the lawful husband of the said Cecilia, and be compelled to solemnize matrimony with her *in facie ecclesiæ*, &c. The evidence is set forth, and is followed by the sentence, which dissolves the marriage *de facto* with Alicia, and pronounces it *fuisse et esse invalidum*, and adjudges the said John “in virum legitimum Cecilie.” It then proceeds thus: “Et ad solemnizandum matrimonium cum eadem in facie ecclesiæ, ut est moris, cononice compellendum et coercendum fore decernimus.” The previous contract was *per verba de futuro*, but it was followed by cohabitation, and was therefore in its legal effect and consequences the same as a contract *per verba de præsenti*. The sentence was appealed from and affirmed.

From this case it appears that the regular course of pro-

ceeding was to make the husband of the second marriage a party to the suit, to pronounce a dissolution of that marriage, to adjudge the husband to be the lawful husband of the party to the first contract, and to decree solemnization in the face of the church. It further appears from the terms of the sentence, that the dissolved marriage was pronounced to have been and to be (*fuisse et esse*) void, agreeably to the rule of the Ecclesiastical Court, that when a marriage * voidable by reason of precontract is annulled, it is * 848 annulled *ab initio*.

Lord COKE, (a) in speaking of these marriages *de facto* voidable by reason of precontract, expresses himself thus: "So it is, if a marriage *de facto* be voidable by divorce in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have been dissolved, and the parties freed *a vinculo matrimonii*; yet, if the husband die before any divorce, then, for that it cannot now be avoided, this wife *de facto* shall be endowed, for this is *legitimum matrimonium quoad dotem*; and so in a writ of dower, the bishop ought to certify that they were *legitimo matrimonio copulati*, according to the words of the writ; and herewith agreeth 10 Edw. 3, 35. But if they were divorced *a vinculo matrimonii* in the life of the husband, she loseth her dower." He cites Bracton to the same effect.

Your Lordships will therefore observe, that when a contract *per verba de presenti* between two parties was followed by a marriage solemnized in the face of the church between one of the parties and another person, the latter marriage was not by reason of the precontract absolutely void, but merely voidable; and, as a consequence of this, that if such marriage were not annulled by sentence of the Ecclesiastical Court in the lifetime of the parties, it could not afterwards be affected; the widow would have her dower, and the children be legitimate.

Such, then, were the principal incidents of this species of contract; the engagement was indissoluble, the parties could not, even by mutual consent, release it; either party might

(a) 1 Inst. 33 a.

compel solemnization *in facie ecclesiæ* ; the parties co-
 * 844 habiting together could not be * punished for fornication, though liable to ecclesiastical censure ; either party cohabiting with another person might be punished for adultery ; and lastly, such a contract was sufficient to avoid, by means of a suit, a subsequent marriage entered into by either of the parties, and solemnized *in facie ecclesiæ*.

It must always be remembered that the Spiritual Courts were the sole judges of the lawfulness of marriage, where that question was directly in issue. If the question, whether a marriage be lawful or not, was raised upon a distinct issue in the Courts of Common Law, the rule was that it should be tried, not by a jury, but referred for decision to the spiritual tribunal, and the certificate of the bishop was conclusive.

The opinions to which I have referred, as to the nature and effect of these contracts, are not, as your Lordships will have observed, merely those of learned individuals and Judges of the ecclesiastical tribunals ; I have also shown that these opinions are confirmed by common-law authorities of the most respected and highest character : that a contract therefore *per verba de præsentis* was, at the period to which we are referring, considered to be a marriage ; that it was, in respect of its “ constituting the substance and forming the indissoluble knot of matrimony ” (to use the expression of Swinburne), regarded as *verum matrimonium*, and was followed by such incidents as I have mentioned, is, I apprehend, clear beyond all controversy.

But then the same authorities inform us that such marriages were irregular, that they were a looser sort of marriages ; that they were not, as Swinburne says, perfect marriages, though equally binding ; that, according to Blackstone, they were marriages for many, and consequently not for all, purposes ; and that, in * order to constitute a regular marriage — a perfect marriage — a marriage with all the consequences belonging to a marriage in its complete and perfect state, solemnization was necessary ; and your Lordships will find that the same ecclesiastical authorities admit in the fullest manner this to be the law, in conformity with

the opinions of the temporal lawyers and the decisions of the civil tribunals.

Swinburne, (a) in the work to which I have before referred, thus expresses himself upon this subject: "Spousals *de præsenti*, though not consummate, be in truth and substance very matrimony. Although by the common laws of this realm (like as it is in France and other places), spousals, not only *de futuro*, but also *de præsenti*, be destitute of many legal effects wherewith marriage solemnized doth abound, whether we respect legitimation of issue, alteration of property in her goods, or right of dower in the husband's lands." And in another place he says, "Yet do not these spousals, that is *per verba de præsenti*, produce all the same effects here in England which matrimony solemnized in the face of the church doth; whether we respect the legitimation of their children, or the property which the husband hath in the wife's goods, or the dower which she is to have in his lands; of which effects we shall have better opportunity to deliver our mind hereafter." Again, "Other effects there be of spousals, whereof some respect the issue or children begotten before celebration of the marriage betwixt those which have contracted spousals, and some have relation to their lands and goods. Concerning their issue, true it is that by the canon law the same is lawful; but by the laws of this realm their issue is not lawful, though the father and the * mother should afterwards celebrate marriage in the * 846 face of the church. Likewise concerning lands, by the canon law the foresaid issue may inherit the same; but it is otherwise by the laws of this realm, for as the issue is not legitimated by subsequent marriage, no more can he inherit his father's land; and as he cannot inherit, no more is she to have any dower of the same lands, for whereas by the laws of this realm a married wife is to have a third part of her husband's lands holden in fee-simple or fee-tail, either general or special, for her dower after her husband's death, during her life, so that she be above the age of nine years at her husband's death, yet, a woman having contracted matrimony,

if the man to whom she was betrothed die before the celebration of the marriage, she cannot have any dower of his lands, because as yet she is not his lawful wife, at least to that effect. Concerning goods, the like may be said of them as hath already been spoken of lands, that is to say, that although by the civil and canon laws, where the man doth gain any of the woman's goods, or the woman gain any of the man's goods, by reason of marriage, spousals *de præsenti* or *de futuro*, consummate with carnal knowledge, have the same effect as hath matrimony solemnized, yet by the laws of this realm it is otherwise; so that neither spousals *de præsenti*, neither spousals *de futuro* consummate, do make her goods his, or his goods hers; and hence it is that a woman contracted in matrimony, dying before the celebration of the marriage, may make her testament, and dispose of all her goods at her own pleasure, which after solemnization of the marriage she cannot do without his license and consent. And on the other side, the man dying intestate before celebration of the marriage, the woman to whom he was betrothed

* 847 *surviving cannot obtain the administration of his goods as his widow, which otherwise, the marriage being solemnized, she might do. And the like I read to be observed in divers other countries, as in France and Saxony, where neither he nor she gain any part of the other's goods by being affianced, unless the marriage be solemnized, if not consummate also."

Lord STOWELL, in like manner, in the *Dalrymple Case*, states, with reference to these contracts, that "the common law had scruples in applying the civil rights of dower and community of goods and legitimacy, in the cases of these looser species of marriage;" obviously meaning, though in more general terms, to express the same opinion as Swinburne, whom, among other authorities, he cites for this position.

The same view of the law was taken by Sir EDWARD SIMPSON in the case of *Scrimshire v. Scrimshire*, which occurred shortly before the Marriage Act; his words are these: "I apprehend, unless persons in England are married according to the rites of the Church of England, they are not entitled to the privileges attending legal marriages, as dower,

thirds," &c. And when Mr. Justice BLACKSTONE says "such marriages are valid for many purposes," and therefore not for "all purposes," it is evident his view of the subject was in accordance with that of the ecclesiastical law authorities to whom I have referred.

The same opinion is expressed by Lord HOLT in the case before referred to. He thus expresses himself: "In the case of a dissenter married to a woman by the minister of a congregation, not in orders, it is said that this marriage is not a nullity, because by the law of nature the contract is binding and sufficient; for though the positive law of man ordains that marriages shall be made by a priest, that law only makes * this marriage irregular, and not ex- * 848 pressly void; but marriages ought to be solemnized according to the rites of the Church of England to entitle to the privileges attending legal marriages, as dower, thirds," &c.

In a learned work, written in a popular form, on the subject of marriage, published in the year 1632, entitled "The Woman's Lawyer," and which has been ascribed to Mr. Justice DODDRIDGE, is the following passage: "If Titus and Sempronia by words *de præsenti* in a lawful consent contract marriage, they are man and wife before God; but public celebration according to law is it which maketh man and wife in plain view of law. One nail keepeth out another, and a firm betrothing forbiddeth any new contract; yet they which dare play man and wife only in the view of heaven and closet of conscience, let them be advised how they shall take the advantages or emoluments of marriage in conscience or in heaven; for, on earth if the priest see no celebrated marriage, the Judge saith no legitimate issue, nor the law any reasonable or constituted dower." This agrees with the other authorities. I refer to it principally on account of its date. It shows what was the generally received opinion upon the subject at that period.

The next point for consideration, therefore, will be, how far these opinions are supported by the decisions of the Courts of Common Law. First, then, as to dower, and the case cited with respect to it from Lord HALE's Manuscripts. An

account of these manuscripts is given by Mr. Hargrave, in the preface to his edition of Coke upon Littleton. There is no doubt they were copied from originals in the handwriting of Lord HALE. The case is this: A. contracts *per* * 849 *verba de præsenti*, with B., and has issue by her, * and afterwards marries C. *in facie ecclesiæ*; B. recovers A. for her husband by sentence of the ordinary; and for not performing the sentence he is excommunicated, and afterwards enfeoffs D., and then marries B. *in facie ecclesiæ*, and dies; she brings dower against D., and recovers, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage, *sed reversatur coram Rege et Concilio quia prædictus A. non fuit seisitus* during the espousals between him and B.

There is, I think, no sufficient foundation for the suggestion that this was not a decision by one of the regular tribunals of the country. It was obviously not considered by Lord HALE as liable to this objection. But as the suggestion has been made, it is proper to observe, that upon the point we are now considering, viz., whether a contract *per verba de præsenti*, without solemnization, would entitle the widow to dower, the Court below and the Court of Appeal entertained the same opinion. The Court below decided the case on the special ground of fraud, because the alienation by the husband had been made *per fraudem mediate* between the sentence and the solemnization, for the purpose of defeating the claim of the wife. It is plain that they would not have taken this as the ground of decision if they had considered that the husband's seisin after the contract, and before the solemnization, would have entitled the wife to dower. Both the Court below and the Court of Appeal agreed therefore in this, that the seisin of the husband after the contract, and before solemnization, would not support a claim to dower.

Perkins, whose authority has always stood deservedly high in our Courts, states, in his valuable Treatise on the * 850 Laws of England, and in conformity with the * above decision, that if a man seised of land in fee make a precontract of matrimony with J. S. and die before the marriage is solemnized, she shall not have dower, for she never

was his wife. It has been supposed that this might have been the case of a contract *per verba de futuro*; but it is, I think, manifestly impossible to put such a construction upon the passage. It would have been altogether idle to have made such a statement as to the law, for it never was and never could have been supposed that a mere contract *per verba de futuro* could give any right to dower. And what reason is there for making so strained a supposition, where the law, as thus stated, conforms, with the decision in the case mentioned by HALE, and with other authorities?

Perkins further goes on to say, that it was holden in the time of King Henry the 3d, that if a wife was married in a chamber she should not have dower by the common law; but he adds, the law is contrary at this day. So that at that period (the reign of Henry the 3d) it appears that nothing short of a solemnization *in facie ecclesiæ* would entitle a woman to dower. Fitzherbert's *Natura Brevium*, 150, is to the same effect: "A woman married in a chamber shall not have dower at common law; 16th Hen. 3. *Quære*," he says, "if marriage made in chapels not consecrated, &c.? for many are by license of the bishop married in chapels, and it seemeth reasonable that in such cases she shall have dower."

I pass from the question of dower to that of legitimacy. One of the earliest cases upon the subject is that of Del Heith, (a) so frequently mentioned, which was decided in the 24 Edw. 1. It was as follows: John Del Heith, brother of Peter Del Heith, held *lands in Bishops- * 851
thorpe, near Norwich, and kept a woman, named Katharine, in concubinage, by whom he had two children, Edmund and Beatrice. Being taken ill, he was advised by the vicar of Plumstead, for the good of his soul, to marry her. As he was unable to go to church, the ceremony was performed in his own house by the vicar, when the said John Del Heith pronounced the usual words, and placed a ring upon her finger; but no mass was celebrated. From that time the parties lived together as man and wife, and had another son called William. On the death of John Del Heith, his brother

(a) Harl. MSS. 2117; Rogers's Ecc. Law, 584.

Peter entered upon his lands as his next heir; but a writ of ejectment was brought by the said William, as son and heir of the deceased. It was asked on the trial whether any espousals were celebrated between his parents in the face of the church, after his father recovered from his illness? And because it was not proved that John Del Heith was ever married to Katharine in the face of the church, the jury found that the plaintiff had no right to the lands; thus proving that he was illegitimate.

Foxcroft's Case, (a) which occurred in the same reign, viz., in the 10th Edw. 1, is to the same effect. The marriage not having been solemnized *in facie ecclesiæ*, the issue was held to be illegitimate. These cases it is said ought to be disregarded, as being manifestly contrary to law, — solemnization *in facie ecclesiæ* never, as it is assumed, having been necessary to the validity and full effect of a marriage.

Why this is to be assumed, in opposition to these express decisions, it is not very easy to understand. *Foxcroft's*
 * 852 *Case* is taken from Rolle's Abridgment, a * work always held in great estimation, and he refers to the Year Book as his authority.

The case is cited without any doubt or question in the Digest of Chief Baron COMYN, and in other similar compilations; and it was quoted as an authority, though for a different purpose, by Lord ELDON and Lord ELLENBOROUGH, in the case of the Banbury Peerage. Upon what principle, then, is it to be assumed that in the reign of Edward the 1st, marriage *in facie ecclesiæ* was not considered necessary upon a question of legitimacy, in opposition to these decisions, and especially when we find it stated by Perkins that in the reign of Henry the 7th it was essential in the case of dower; and which is also stated by Fitzherbert, in his *Natura Brevium*? When the Spiritual Court decreed a marriage, it always decreed it to be solemnized *in facie ecclesiæ*, and every other marriage was irregular and clandestine.

Upon this question of legitimacy it is material to observe, that Goldingham, one of the civilians called in for the assist-

(a) 1 Roll. Abr. 359.

ance of the Court in *Bunting's Case*, stated, that if issue be born after the contract of marriage (he is speaking of a contract *per verba de præsenti*), and before the solemnization, such issue is legitimate; but he adds, that is when espousals afterwards take place, for if espousals do not succeed, the issue, he says, born after the contract, will be illegitimate; and this was not controverted by the civilian who argued on the other side. When he says that the issue would be legitimate if espousals afterwards take place, he is evidently referring to the doctrine of relation, which was always rejected by our law.

Another authority to the same effect is Godolphin, who states in his *Repertorium Canonicum*, that "by the common law he or she that is born before marriage *cele- * 853 brated between the father and mother, is called a bastard."

When the question of legitimacy depended on the lawfulness of the marriage, it was tried on the issue of *ne unques accouple* in loyal matrimony; the same as in dower. But it is, I think, clear that a contract *per verba de præsenti*, without solemnization, would not entitle the wife to dower. It follows, therefore, that upon the issue of *ne unques accouple*, &c., the bishop must, in a case of dower, have certified against the marriage, or the rule of law in the case of dower must have been defeated. But the issue being the same upon the question of legitimacy, there must have been the same certificate; and as the certificate is conclusive, there must consequently have been the same result.

In the case of *Wickham v. Enfeild*, (a) which has been cited, the bishop, instead of the usual form of certificate, returned that the parties were coupled *in vero matrimonio sed clandestino*. The Judges, upon exception to the certificate, determined it to be sufficient. They considered *verum* to be equivalent to *legitimum*; for they were all one, it was said, in intendment, and that the return was not affected by the addition of clandestine. The finding that the marriage was clandestine was not inconsistent with its being *legitimum*, for though performed by a priest it might still have been clandestine.

(a) Cro. Car. 851.

If it is supposed that a contract *per verba de præsenti* would confer the right to dower, and that the issue would be legitimate, this consequence might ensue: Suppose after such a contract the man were to marry another woman *in facie*
 * 854 *ecclesiæ*, and have issue and * die, the second wife would clearly be entitled to dower. Could the first be also entitled? There could not be two contemporaneous marriages with the same man, entitling two women to dower and out of the same estate. Again, the issue of the second marriage would be clearly legitimate. If the man had sexual intercourse with the first woman after the second marriage, and had issue by her, could such issue be legitimate? There could not be two legitimate children of the same father, born of two contemporaneous marriages.

There is another distinction between a contract *per verba de præsenti* and a regular marriage, which relates to their effect upon the property of the respective parties: "If a contract of marriage be between a man and a woman, yet one of them may enfeoff the other, for yet they are not one person in law, inasmuch as if the woman dieth before the marriage solemnized between them, the man unto whom she was contracted shall not have the goods of the wife as her husband, but the wife may make a will thereof without the agreement of him unto whom she was contracted; but after the marriage celebrated between them the man cannot enfeoff his wife, for then they are one person in law." It is evident that Perkins in this passage is speaking of a contract of marriage *per verba de præsenti*; and this, therefore, is another instance of the different legal effect of such a contract and a regular marriage.

Lord HALE, at the conclusion of the case reported by him, adds these words: "*Nota*, Neither the contract nor the sentence was a marriage." By which he may perhaps have meant, not such a complete marriage as to give a right to dower. The observation of Perkins, that she never was his wife, made in the cases to which I have referred, ought
 * 855 perhaps to be * taken with the same qualification.

Lord COKE, speaking of the effect, after the death of the husband, of what he calls an inchoate marriage, says it shall be accounted a lawful marriage *quoad dotem*.

Another and a very important circumstance in which these irregular marriages differed from a marriage solemnized according to the rites of the church, is, that neither party could maintain a suit against the other for the restitution of conjugal rights. The law is so laid down by Sir EDWARD SIMPSON in the case of *Scrimshire v. Scrimshire*, and cannot, I think, be doubted.

So also as to the right to administer to the effects of a deceased wife, a contract *per verba de præsenti* has been considered insufficient. That was the case of *Haydon v. Gould*. (a) There was a contract *per verba de præsenti*, and the parties afterwards cohabited as man and wife for several years; but it appearing that the person who performed the ceremony was not in orders, but a mere layman, which was known by the parties, the letters of administration were recalled by the court; and upon appeal the sentence was confirmed by the delegates. This decision does not appear to have been ever questioned. It is cited with approbation by Sir WILLIAM WYNNE, and referred to without any doubt as to its soundness by Sir JOHN NICHOLL.

It was argued in that case that the marriage was not a mere nullity; that it was irregular only, but not void; that it was sufficient by the law of nature, though the positive law ordained that it should be by a priest. But it was said in answer, that the man demanding a right due to him by the ecclesiastical law, must prove himself * a hus- * 856 band according to that law. The decision in this case is another instance in accordance with those which I have already mentioned, of the civil effects of a regular marriage being withheld from a contract *per verba de præsenti* not duly solemnized according to the rules of the ecclesiastical law.

A further and perhaps the most essential circumstance in which a contract *per verba de præsenti* differed from a regular and perfect marriage, is that to which I have already adverted; viz., that if a man, after having entered into a regular marriage, married a second time, his first wife living, the

(a) 1 Salk. 119.

second marriage was absolutely void, and the issue of course illegitimate. But where the first engagement was merely a contract *per verba de præsenti*, the second marriage was only voidable; and if not set aside during the lifetime of the parties it could not afterwards be questioned, and the issue would be legitimate. This is abundantly clear from the passage which I have already cited from Coke Littleton, as well as from other authorities.

The subsequent decisions of the Courts of Common Law, until we come down to comparatively modern times, are not at variance but in conformity with the previous authorities.

In *Welde v. Chamberlaine*, (a) which was an issue marriage or no marriage, a contract *per verba de præsenti* was proved; but the doubt suggested was, that as there was no ring the ceremony was invalid, as not conforming to the Book of Common-prayer. PEMBERTON, Chief Justice, inclined to think that a contract *per verba de præsenti*, repeated after the parson in holy orders, was sufficient; but he reserved

* 857 * the point for the consideration of the Court. It is obvious, therefore, that a mere contract *per verba de præsenti* was considered in that case to be insufficient.

So, in *Holder v. Dickeson*, (b) VAUGHAN, Chief Justice, was of opinion that a priest was necessary for the marriage. The other Judges did not differ from the Chief Justice in this respect, though they considered it unnecessary to aver *quod obtulit se* in the presence of a parson, which was the objection made to the declaration.

In *Paine's Case* (c) it was said, that in a suit for dissolving a marriage on the ground of precontract, the parties contracting became husband and wife by the effect of the sentence, without further solemnity; and NOY's authority was cited for this position. But TWISDEN, Chief Justice, denied this, and said the marriage must be solemnized before they could be completely baron and feme. This opinion expressed by the Chief Justice corresponds with what was stated in *Bunting's Case*, and the other more ancient authorities upon the subject.

(a) 2 Show. 300.

(b) 1 Freem. 95.

(c) 1 Sid. 13.

It is obvious that none of these cases impeaches the doctrine stated both by the ecclesiastical and temporal lawyers, as to the imperfect effect, with regard to its civil consequences, of a contract of marriage *per verba de præsenti*, not accompanied or followed by due solemnization. It is not immaterial to observe that the cases occurred before the Marriage Act, when the subject was much more familiar to both classes of lawyers, ecclesiastical as well as temporal, than it has been since the change introduced by that statute. I have come, therefore, to this conclusion, that although a marriage contracted *per verba de præsenti* * was indissoluble, — though it could not be released * 858 even by the mutual consent of the parties, — though either of them might enforce it, and compel solemnization, — though it had the effect of rendering a subsequent marriage solemnized *in facie ecclesiæ*, even after cohabitation and the birth of children, voidable, — though it was considered to be of the essence and substance of matrimony, and was therefore, and on account of its indissoluble character, styled in the ecclesiastical law *verum matrimonium*, — yet by the law of England, according to the concurrent opinion of both the ecclesiastical and temporal lawyers, this irregular and looser sort of marriage did not confer those rights of property, or the more important right of legitimacy, consequent on a marriage duly solemnized according to the rites of the church. Whatever name, therefore, is given to the connection, this is, I conceive, a correct description of the situation of the parties who, previously to the Marriage Act, had entered into a contract of marriage *per verba de præsenti*, not followed by solemnization.

Various questions and considerations connected with this subject have presented themselves in the course of these discussions, and to which I shall shortly advert. First, as to the religious ceremony :

It appears from the authorities to which I have referred, that it was formerly considered essential to the full effect of a marriage that it should be solemnized in the church. The ceremony is well known ; it had been in use for many hundred years, and corresponded in substance with the present

form. This appears from several ancient manuals, particularly those of Salisbury and York, which are still in existence.

The rule as to the necessity of a public celebration
* 859 was afterwards relaxed, and it is clear that in * the

Temporal Courts the same consequences attended these marriages as if they had been celebrated *in facie ecclesiæ*. I, of course, except the case of dower *ad ostium ecclesiæ*, which depended upon a particular rule. Such marriages, however, though performed by a person in holy orders, and according to the rules of the church, were considered to be clandestine, and subjected the parties to the censures of the church. Two instances are mentioned in which, according to popular tradition, such censure was pronounced; viz., upon the marriage of Sir EDWARD COKE with Lady Hatton, and the marriage of the Lord Chancellor ELLESMERE. In the former case the censure is said to have been slight, the parties having erred from ignorance of the law; but in no case of this sort, where the marriage ceremony was performed by a person in holy orders, although the parties might be liable to ecclesiastical censure, were they ever compelled to repeat the ceremony in the face of the church. It is obvious, therefore, that such marriages, though clandestine, were considered by the Ecclesiastical Courts to be complete and lawful marriages, as they indisputably were by the Courts of Common Law. Still, however, the Spiritual Court, when it decreed the performance of marriage, always decreed that it should be solemnized in the face of the church.

A question has been raised as to the celebration of the marriage ceremony by a deacon; and it has been asked, if it was formerly required that the ceremony should be performed by a person in priest's orders, by what authority this change was introduced. It appears, by reference to the ancient rituals, that formerly the sacrament was administered before the nuptial benediction was pronounced, and that, as this
could only be administered by a priest, his presence
* 860 * was necessary. Marriage itself was also, by the
mere nature and force of the contract, considered to
be a sacrament; and the solemnization, therefore, by a priest
might on this ground have been thought necessary; but when,

at the Reformation, it ceased to be considered as a sacrament, and when it was no longer required that the sacrament should be administered at the time of the marriage, there was no reason why the ceremony should not be performed by a person in holy orders as a deacon.

It is further to be observed, that in the Act of Uniformity, 13th & 14th Charles 2, it is expressly enacted, that certain of the offices contained in the Book of Common-prayer shall be performed only by a priest; thereby constructively admitting that the other offices, of which matrimony is one, may be performed by a deacon.

It is said that a marriage may be valid, though not performed by a person in holy orders, as in the case stated by Lord STOWELL, in *Hawke v. Corri*: (a) "It seems," he says, "to be a generally accredited opinion, that if a marriage is had by the ministration of a person in the church who is ostensibly in holy orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married are not expected to ask for the sight of the minister's letters of orders, and if they saw them, could not be expected to inquire into their authenticity." I do not very well understand the inference intended to be drawn from this case. It amounts to nothing more than this, that where the law requires the ministration of a person in holy orders, if a man assumes that character under such circumstances as * to impose upon those * 861 who require his ministration, and they, acting fairly and *bonâ fide*, are deceived in this particular, the Court which has to decide on the validity of the transaction will not suffer them to be the victims of imposition and fraud, but will decree in favour of the marriage. This exception can only apply in cases where, by the general rule of law, the service of a person in holy orders is necessary; and cannot, therefore, be properly used to impeach that rule.

Another question that has been raised, and which bears immediately upon the judgment of the Court below, is this: Assuming that a marriage can be solemnized only by a person

(a) 2 Hagg. Cons. Rep. 280.

in holy orders, whether a Presbyterian minister, regularly ordained according to the rules of the Presbyterian church, is competent to perform the ceremony between members of the Established Church, so as to give full validity and effect to the marriage ?

Holy orders, according to the law of England, are orders conferred by episcopal ordination. This was the law of the Catholic church in this country, and the same law continued after the Reformation as the law of the Episcopal Reformed Church, distinguished by the appellation of the Church of England. The mode of conferring these orders is prescribed in the Act of Uniformity, 2 & 3 Edw. 6, and 13 & 14 Chas. 2. Similar laws were passed at about the same periods in Ireland, for the regulation of the church of that country, which was founded on the same principles and governed by the same rules as the Church of England. A marriage celebrated by a Roman Catholic priest, as in *Fielding's Case* and other instances, has been considered valid. A priest of the

Romish church is a priest by episcopal ordination,
 * 862 * and his orders are accounted holy orders by our church. If he conforms to the Protestant faith, and is presented to a benefice, no new ordination is necessary ; nor would it, indeed, be proper.

The two Churches of England and Ireland, the same in doctrine, in ceremony, and in discipline, have been united, and the same law which applied to each church in its separate state has become the law of the united church. It is said that we admit the validity of the ordination of the ministers of the Church of Scotland, and that by the Act of Union their title, as legally ordained ministers, is valid in every part of the empire. As respects their reverend character that certainly is so ; but this conveys no authority out of Scotland. Holy orders in England still mean the same thing as before the union with Scotland ; viz., orders conferred by episcopal ordination ; and what is required to be done by a minister in holy orders cannot, therefore, be done by an ordained minister of the Scotch church. The question is not affected by the Toleration Acts. These Acts remove penalties and disabilities ; they confer no title. The claim made by the Presbyte-

riams in Ireland cannot be supported upon any principle that would not apply equally to every denomination of dissenters. I respect the character of the Presbyterian ministers of Ireland, their learning and piety; but this is a question of mere legal interpretation, which must be determined without reference to the character or conduct of the parties.

The view I have taken of the effect of a marriage contract *per verba de præsenti* will afford an immediate and satisfactory answer to the inference attempted to be drawn from different statutes passed * with reference to this * 863 subject. I allude, in the first place, to the Statute 12 Chas. 2, c. 33, for confirmation of marriages during the Commonwealth. It is said that if a contract *per verba de præsenti* be an actual marriage, what necessity was there for this Act? for the marriages entered into under the ordinance were of this nature. Undoubtedly that is so; but if such contracts were not followed by all the consequences of marriages regularly solemnized, the Act was obviously necessary, and it accordingly puts these marriages on the same footing as marriages solemnized according to the rites of the Church of England. Equally plain is the explanation of the clause in the statute, by which the validity of these marriages is left to the decision of the Temporal Courts. The reason is obvious: When they were rendered valid and binding by the Act, the question in each instance would not be a question of ecclesiastical law, but merely whether the particular case came within the provisions of the statuté.

The same observation will apply to the reasoning founded on the different Acts relating to marriages celebrated by Presbyterian ministers in Ireland and in India. But then it must also be admitted that these Acts would have been unnecessary, if a contract *per verba de præsenti* had been attended with the same civil rights as to property, &c., as a regular marriage solemnized according to the rules of the church. I place very little stress upon the argument that has been founded upon the form of certain of the statutes relating to this subject, some of them being enacting and others declaratory. They appear in a great degree, if I may so express myself, to neutralize each other; and many of

them are wholly inconsistent with the notion that the
 * 864 legislature considered a contract *per * verba de præsenti*
 to have the full effect of a regular solemnized marriage.

I must not pass over the observations that have been made upon the marriages of Jews and Quakers. It is said they can only be supported on the ground of their being contracts *per verba de præsenti*, or *de futuro* followed by cohabitation.

No such argument can, I think, be justly raised from the decisions respecting marriages amongst the Jews. They are treated in those decisions as a distinct people, governed, as to this subject, by their own religious observances and institutions, among which marriage is included. Speaking upon this subject, Lord STOWELL, in the case of *Ruding v. Smith*, (a) observes that “the matrimonial law of England for the Jews is their own matrimonial law; and an English Court Christian, examining the validity of an English Jew marriage, would examine it by that law, and that law only, as has been done in the cases that were determined in this Court on those very principles.” Such are the admitted grounds of decision in the case of Jewish marriages.

The question as to the marriage of Quakers is of more difficult solution. In the case so frequently referred to, before Lord HALE, that learned Judge is reported to have said, that he would not on his own opinion make their children bastards; and he directed the jury to find a special verdict. It would seem, therefore, that the inclination of his opinion was against the validity of the marriage. If he had considered a contract *per verba de præsenti* to have been sufficient, there would have been no difficulty in the case, and he would

at once have decided accordingly. Burnet states, that
 * 865 Hale considered “all marriages, * made according to
 the several persuasions of men, ought to have their effects in law.” It is not improbable, therefore, that this was the ground on which he refused to decide the question. Lord Keeper North, no mean lawyer, though full of religious and party prejudices, considered the point too clear for doubt; and observing upon the course pursued by Hale in

(a) 2 Hagg. Cons. Rep. 371.

this case, made it the ground of a bitter and not very decent attack upon that distinguished Judge.

In a case mentioned by Mr. Justice WILLES, in *Harford v. Morris*, (a) and in *Woolston v. Scott* (b) before Mr. Justice DENISON, the former of which was the case of a marriage between Quakers, and the latter an Anabaptist marriage, it was held that an action of criminal conversation might be sustained. Mr. Justice BULLER, in commenting, in his *Law of Nisi Prius*, on the latter decision, does not suggest as the ground of the judgment that the marriage was valid as being a contract *per verba de præsenti*, but observes that it had been doubted whether the ceremony must not be performed according to the rites of the church: but as this, he says, is an action against a wrong-doer, and not a claim of right, it seems sufficient to prove the marriage according to any form of religion, as in the case of Quakers, Anabaptists, Jews, &c. He rests this class of cases, therefore, upon the distinction made in the Courts of Law between a claim of right and proceedings against a wrong-doer.

In *Green v. Green*, (c) which was also the case of a Quaker marriage, it was considered that a marriage according to the forms used among that sect was not sufficient to support a suit for the restitution of conjugal rights.

* A question as to the effect of those marriages arose * 866 in the case of *Haughton v. Haughton*, (d) before Lord MANNERS, when Chancellor of Ireland. He decided in favour of their validity, but not on the ground of a contract *per verba de præsenti*, but because he considered that they were included in the Irish Statute 21 & 22 Geo. 3, for the relief of dissenters. Quakers are excepted from the Marriage Act, but no other dissenters; and being put in this respect on the same footing with the Jews, it is not an unfair inference that the legislature intended to place them on the same footing with respect to their marriages, and thus constructively to legalize them. This provision in the Act was considered by Sir WILLIAM WYNNE, in *Sylveira v. Alvarez*, as a strong recognition of the validity of these marriages. In none of

(a) 1 Hagg. C. Rep. App. 9.

(b) Bull. N. P. 28.

(c) 1 Hagg. C. Rep. App. 9.

(d) 1 Moll. 611.

the cases is it rested on the ground of the form constituting a contract *per verba de præsenti*. Although these marriages, therefore, may afford materials for popular reasoning, they do not, I think, lead to any certain conclusion, or give a greater effect to a contract *per verba de præsenti* than is ascribed to it by the authorities to which I have before referred.

I abstain from referring in detail to the convictions for bigamy in Ireland, in the cases of marriages not authorized by the legislature, because this is the very subject of the present appeal ; but I freely admit that the opinions of the learned Judges, under whose direction these convictions occurred, are entitled to the greatest consideration and respect.

Several modern cases have been referred to, in which the question as to the effect of a contract *per verba de præsenti* has been more or less considered. I will refer to them in their order.

* 867 * The first is that of *The King v. The Inhabitants of Brampton*, (a) in the time of Lord ELLENBOROUGH. In that case the marriage was publicly celebrated by a person officiating as a priest, in a chapel in the town of Cape St. Nicola Mole, in St. Domingo. What Lord ELLENBOROUGH said upon this occasion does not admit of dispute. His words were these: "A contract of marriage *per verba de præsenti* would have bound the parties before the Marriage Act ; and this appears to have been *per verba de præsenti*, and to have been celebrated by a priest ;" and, after alluding to *Fielding's Case*, (b) he adds, "There is this further circumstance, that the ceremony was performed in a public chapel, instead of in private lodgings, as it was in *Mr. Fielding's Case*." All this is perfectly consistent with the view I have taken of this subject. In the case of *Latour v. Teasdale*, (c) the marriage ceremony was performed by a Roman Catholic priest in the Black Town, at Madras. This case was the same in principle as the former, except that the ceremony here was performed, not in a chapel, but in a private room, as in *Fielding's Case*. Chief Justice GIBBS, a very acute lawyer, stated on that occasion, but unnecessarily, — for the

(a) 10 East, 282.

(b) 14 St. Tr. 1327.

(c) 8 Taunt. 830; 2 Marsh. 233.

ceremony was performed by a priest, — the broad principle, that a contract *per verba de præsenti* was before the Marriage Act considered as an actual marriage; but he adds, that doubts have been entertained whether it was so unless followed by cohabitation. There is no foundation for the doubts that were suggested by the Chief Justice; and in stating the general position he did not accompany it with any of the explanations and qualifications with * which it had * 868 been stated by Lord STOWELL and other eminent civil-ians.

In *Beer v. Ward*, (a) which was an issue out of Chancery, the same position was stated by Lord TENTERDEN, an extremely cautious and very learned Judge, in his direction to the jury. But Lord ELDON, when the case afterwards came before him, and whose attention had been frequently directed to questions of this nature, appears from the short-hand writer's notes of the case, which I have carefully read, to have cautiously abstained from adopting this position, and, after suggesting some other points for consideration, directed a new trial to be had at the bar of the Court of King's Bench.

It may be proper to observe, with reference to this last decision, that in the case of *The King v. The Inhabitants of Bathwick*, (b) the Court of King's Bench seems to have considered it necessary that the marriage should have been celebrated by a clergyman, for in any other view of that case the points in controversy must have been wholly immaterial. Lord TENTERDEN was at that time Chief Justice of the King's Bench, and after consideration delivered the judgment of the Court.

In the case of *Smith v. Maxwell*, (c) before Lord WYNFORD, the only question was, whether in Ireland a marriage in a private house was valid. The marriage ceremony was performed by the curate of the parish, and the learned Judge decided that such a marriage was legal, and that it need not be celebrated in the church. To the same effect was the

(a) MS. *Vide ante*, 611.

(b) 2 Bar. & Ad. 639.

(c) 1 Ry. & Moo. N. P. 80.

judgment of Sir JOHN NICHOLL, in *Steadman v. Powell*. (a) In * Ireland, he says, marriage may be had without any celebration *in facie ecclesiæ* or in the presence of witnesses. By celebration *in facie ecclesiæ*, he obviously meant in a church, in contradistinction to a private house, where the marriage in question in that case was performed. Lyndwoode's explanations of the terms *in facie ecclesiæ* is this, "in conspectu ecclesiæ, populi scilicet congregati in ecclesiâ." The main point in controversy in the case of *Steadman v. Powell* was, whether the priest who performed the ceremony was a Roman Catholic.

The opinion of Lord ELDON, in the case of *M'Adam v. Walker*, (b) was pronounced in a Scotch case, and obviously had reference to the law of that country.

If I may refer to the opinion of the several eminent lawyers, both of the Ecclesiastical and Civil Courts, who were consulted upon the subject of marriages in India performed by ministers of the Church of Scotland, it will be found that they all concurred in stating that those marriages were not to all purposes legal marriages, but that they were binding upon the parties, so that a subsequent marriage by either during the life of the other, with a third person, would be invalid. To this opinion I entirely assent.

I fully admit the learning, ability, and experience of the several distinguished Judges to whom I have thus referred: but with the explanations which I have given, I do not see sufficient ground in these opinions to lead me to change my view of this subject, agreeing as it does with what has been laid down by the most eminent civilians, and with the corresponding decisions of the Courts of Common Law from the earliest period of our history.

I have been led, in consequence of the range that * 870 * has been taken in these discussions, and the great and important interests which they involve, to enter into the consideration of this subject more extensively than is perhaps necessary for the decision of the question immediately before your Lordships. The immediate point for de-

(a) 1 Addams, 8.

(b) 1 Dow, 148.

cision is, whether the defendant George Millis is, under the circumstances stated in the special verdict, guilty of the crime of bigamy. The marriage in Ireland, which is the first marriage, is not rendered valid by statute, one of the parties being a member of the Established Church. If, therefore, it was not celebrated by a person in holy orders, according to the meaning of those terms in the law of England, it can, I think, operate only as a contract *per verba de præsenti*; and the question will be, whether such a contract is sufficient to support the indictment. And upon this point, I confess I should feel great difficulty in dissenting from the opinion of the Queen's Judges, as expressed by the learned Chief Justice. "If," he says (*ante*, p. 689), "a marriage *per verba de præsenti* without any ceremony is good for the first marriage, it is good also for the second; but," he adds, "it never could be supposed that the legislature intended to visit with capital punishment (for the offence would be capital if the plea of clergy could be counter-pleaded) the man who had in each instance entered into a contract *per verba de præsenti*, and nothing more."

But independently of this consideration, it is material upon this part of the subject to advert again to the effect of such a contract. Let me suppose a contract of marriage *per verba de præsenti*, and a subsequent marriage duly solemnized by the same man with another woman. The woman dies,—the marriage becomes binding, and the issue legitimate. How can * a prosecution for bigamy be sus- * 871 tained for entering into a marriage which the law recognizes, and will not suffer to be annulled? But if an indictment could not, under such circumstances, be maintained, neither could it, I conceive, during the life of the woman; for the guilt or innocence of the husband could never be made to depend upon the accident of her life or death.

I may further observe to your Lordships, that it seems never to have occurred to any one, in suits to annul a marriage by reason of precontract, to suggest that the party had been guilty of bigamy. There is no trace of any such intimation; and yet in every one of these cases, if a contract *per*

verba de præsenti were sufficient for this purpose, that offence must have been committed.

But there is another difficulty in the way of the prosecution in this case, arising out of the change introduced into the law of Ireland by the Statute 58 Geo. 3, c. 81. It is thereby enacted, "That in no case whatsoever shall any suit or proceeding be had in any Ecclesiastical Court in Ireland, in order to compel a celebration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony whatever, whether *per verba de præsenti* or *per verba de futuro*, which shall be entered into after the end and expiration of ten days next after the passing of this Act." This clause is copied from the 13th section of the English Marriage Act. The effect of this statute has been to change entirely the character of a contract *per verba de præsenti*, at least as to its temporal effect. It is no longer indissoluble; solemnization cannot be

enforced; it has no longer the effect of avoiding a subsequent marriage solemnized *in facie* * 872 *ecclesiæ*, but

such marriage is from the time of its celebration valid and binding, and accompanied with all the civil consequences of a regular and perfect marriage. How then can such a marriage, which the law sanctions, and the obligations of which it enforces, constitute the crime of bigamy? In this offence it is the second marriage that is the criminal act; such marriage is a mere nullity; it is simply void, and so completely void that the woman may be examined as a witness against the person with whom she has gone through the ceremony of marriage. But in the case of a contract *per verba de præsenti*, followed by a subsequent marriage with another person duly solemnized, the second marriage is, on the contrary, by the law of Ireland, legal and binding.

It cannot, I think, be contended, at least with any effect, that as the Act in its terms only prevents a proceeding to enforce the performance of the marriage contract, a suit may still be instituted for annulling a subsequent marriage solemnized *in facie ecclesiæ*. It is not, I think, very reasonable to suppose that such could have been the intention of the legislature. For what purpose could such a proceeding be had, unless with a view of enforcing the performance of the

first contract, which the statute declares shall no longer be done?

Sir WILLIAM BLACKSTONE appears to have entertained the same opinion upon the construction of the English Marriage Act, which contains precisely the same provision; and from that time to the present, a period of nearly a century, no such suit has ever been instituted, or, as far as I can learn, ever contemplated.

I am of opinion, therefore, after much anxious consideration, for the reasons and upon the grounds which I have thus stated to your Lordships, but at the * same * 873 time with all due deference and respect for those who differ from me on this subject, that the indictment against the defendant, George Millis, cannot be sustained.

LORD COTTENHAM. — I have not, in the course of a pretty long professional life, met with any case so embarrassing as the present. It is impossible to come to any conclusion without overruling authorities to which the greatest possible respect is due. The highest names in the history of the law stand opposed to each other. If the conclusion to which I have felt myself compelled to come be erroneous, the error has not arisen from any prepossession of my mind. The many great modern authorities who have expressed opinions inconsistent with the judgment under review; the presumption that the law of this country respecting marriage, previous to the Marriage Act of 26 Geo. 2, c. 33 (1753), had been the same as prevailed in other countries which derived their law upon that subject from the same source; and a consideration of the great evils necessarily attendant upon a confirmation of the judgment, — had raised in my mind a very strong impression that the judgment was erroneous, and no slight wish that it might be found to be so. It was not until I came to examine in private the early authorities, and to consider the weight of the objections which have been raised to them, that I found it impossible, consistently with the duty I owe to this House and to the public, to adopt any conclusion but that to which these authorities uniformly and of necessity lead.

It is to be observed in the outset that the present inquiry

is as to the state of the law as it existed before 1753.

* 874 Ninety years have elapsed since that * state of the law has ceased to exist in this country, — a circumstance which adds greatly to the difficulty of the inquiry, and which it is of the utmost importance to keep in mind, when striking the balance between the authorities which preceded and those which followed that date. The former arose in administering the then existing law, and proceeded from Judges necessarily conversant with all that affected the important subject of marriage. The latter consist principally of expressions of impressions of what the law had been at former times, and of the administration of which the authors of those opinions probably never had, or had ceased to have, any experience; and it is obvious that the observation applies the more strongly to those authorities which are the most removed from the time at which this law, by the passing of the Marriage Act, ceased to exist in this country.

The question is, did a contract of marriage *per verba de presenti tempore*, without the intervention of a priest in holy orders, constitute a valid marriage by the law of this country as it existed before the passing of the Marriage Act? In considering this matter the first question a lawyer would ask is, what decisions are there to be found of that period upon this subject? The answer, I regret to say, must be that there are many, and that all, without any exception, held that such contract did not constitute a valid marriage.

Upon an examination of these authorities the whole question must depend. Since the Marriage Act there cannot have been many occasions of decision upon the subject; and the opinions of modern Judges and writers, however important as commentators upon a law which had ceased to exist, cannot

be of avail unless supported by decisions and
 * 875 authorities of the times * during which the law prevailed. But before I proceed to examine these authorities, it will be desirable to clear the way by disposing of some arguments, which, if well founded, would go far to prove that there could not have been any such decisions; or that if there were any, they must necessarily have been erroneous.

The civil law, it has been said, was the foundation of the law of marriage in Europe, and that by that law, before the Council of Trent, a contract *per verba de præsenti* constituted marriage, as it does in Scotland to this day; and that there was no reason to suppose that the marriage law of England was at that time different from the marriage law of other Christian countries; but, on the contrary, as the subject of marriage was under the jurisdiction of the Ecclesiastical Courts, and as there was an appeal from those Courts to Rome, it was to be assumed that the marriage law of this country and of Rome was the same.

Now it is quite certain that the civil and canon law never had, as such, any authority in this country; but, in the language of the Statute of 25 Hen. 8, c. 21, "such laws had effect only so far as the Sovereign and people of this realm had taken them at their free liberty, at their own consent, to be used amongst them; and had bound themselves by long use and custom to the observance of the same." In illustration of which, Blackstone, following the example of Sir MATTHEW HALE, classes the civil and canon law in use in this country as part of the common or unwritten law. And with respect to the appeal to Rome, Blackstone (a) observes, that the Act of Hen. 8, which subjected those who should appeal to Rome to the * penalties of a *præmunire*, only * 876 punished that which was illegal before.

The rules, therefore, of the civil and canon law, as generally received, cannot materially bear upon the present inquiry; but it is highly important to ascertain what were the rules in this respect by which the Ecclesiastical Courts in this country were regulated; for as the jurisdiction of all questions of marriage has been exercised by the Ecclesiastical Courts ever since their separation from the Civil Courts soon after the Conquest, the law of those Courts must have been at all times the law of the country. It is true that in certain cases in which questions of marriage arose incidentally, as in personal actions, in which the right depended upon the fact of marriage, and not upon its legality, reference was not

(a) 4 Comm. 115.

made to the ecclesiastical authorities ; yet as that was the only course in all cases in which the validity of a marriage was directly in issue, in all which cases the Civil Court was bound to respect the certificate of the bishop as conclusive, it follows that the Civil Courts could not have had any rules but those which they received from the ecclesiastical authorities ; and this may account for the fluctuations which appear at different times to have taken place ; a clandestine marriage, that is, one not celebrated *in facie ecclesiæ*, being at some periods treated as void, and at others only as irregular ; and a mass-priest being in some cases treated as necessary to give validity to a marriage, and in others, any one in holy orders being considered as sufficient for that purpose.

It is expedient, therefore, to ascertain as far as possible what rules were prescribed to the Ecclesiastical Courts by the authorities within this realm ; and if it shall appear * 877 that before the time at which the * canon law is stated to have been introduced into this country, that is, before 1290, there were laws existing which regulated the proceedings and decisions respecting marriage, and which do not appear afterwards to have been altered, it must be of more importance to look to such laws than to the rules of the general civil or canon law ; and it appears that there were such laws, and that by those laws the intervention of a person in orders was necessary to constitute a valid marriage. The Institutes of Edmund direct that in nuptials there shall be a mass-priest, who shall with God's blessing join the parties together ("*adunare*" is the word) to all prosperity. And by the ordinance of a council held at Winchester in the time of Archbishop Lanfranc, 1076, (a) it was declared that a marriage without the benediction of a priest should not be a legitimate marriage, and that other marriages should be deemed fornication ; and many other provisions against clandestine marriages prove that such marriages were in fact celebrated by priests.

I see no reason to doubt the authenticity of these ancient ordinances, and if genuine, they establish the fact that from

(a) Johnst. Ecc. Law ; A.D. 1076, § 5.

the earliest time the laws of England upon this subject differed from the civil and canon law, and required the intervention of an ecclesiastical authority to make a valid marriage. If any doubt could exist as to the authenticity of these ordinances, or as to whether they had been adopted by the laws of this country, and had so become part of such law, such doubt would be removed if it should be found that the decisions of the Civil and Ecclesiastical Courts were in conformity with the directions therein contained; which leads to an examination of such reported cases as have been produced for this purpose.

* In order to judge of the weight and importance of * 878 these decisions, it is proper to consider by what tests the validity of a marriage is to be tried; and it is obvious that the consequences of a valid marriage must be, —

1st. To give to the woman the right of a wife in respect to dower.

2d. To give to the man the right of a husband in the property of the woman.

3d. To give to the issue the right of legitimacy.

4th. To impose upon the woman the incapacities of coverture.

5th. To make the marriage of either of the parties, living the other, with a third person, void.

Upon each of these heads there is a clear authority that none of these consequences followed from a contract of marriage *per verba de præsenti*, without the intervention of a person in holy orders.

First, a contract *per verba de præsenti* did not give to the woman the right of a wife in respect to dower.

Upon this first point, the note from Lord HALE's MSS., (a) if entitled to credit, and if construed according to the ordinary and technical meaning of the words used, is decisive. As to its authenticity, we are told in the preface to the 13th edition of Coke upon Littleton, that this and the other notes are in the handwriting of Lord HALE, in the margin of a copy of Coke upon Littleton in the possession of Mr. Gybbon, to

(a) Co. Litt. 83 a, n. (10).

whose father it was presented by Lord HALE; and that the copy of the notes from which the notes in the 13th edition of Coke upon Littleton were taken was made from the original, for the use of Mr. Yorke, and then in the possession of the late Lord * HARDWICKE. It appears, therefore, that the note in question exists in the handwriting of Lord HALE; and there does not appear to be any reason for doubting that what was so written by him was his own composition, and not copied from any other writing, and that what he states to have been decided was at least believed by him to have been so decided, and that the observations upon such decision were his own.

What, then, does Lord HALE state to have been decided? and what are his observations upon it? He states a case, *coram Rege*, 9th & 10th Edw. 1, in which the facts were, first, a contract between A. and B. *per verba de præsenti* and issue; second, a marriage *in facie ecclesiæ* between A. and C.; third, a sentence by the ordinary, whereby B. recovered A. for her husband, and excommunication of A. for not performing the sentence; fourth, a subsequent enfeoffment by A. of land to D.; and, fifth, a subsequent marriage *in facie ecclesiæ* between A. and B., and the death of A.

The decision of the Court below was, that B. was entitled to dower out of the lands of which D. had been enfeoffed, not by force of the contract *per verba de præsenti* between A. and B., but because the feoffment between the sentence and the solemn marriage was a fraud; but that was reversed *coram Rege et Concilio*, because there was no seisin in A. during the espousals; and of this Lord HALE expresses his approbation by the note, "Neither the contract nor the sentence was a marriage."

Now it is to be observed that both these judgments assume that the contract was not a marriage. If it had been considered to be a marriage, the Court below would have found a seisin, in fact, during the coverture, and would not have resorted to the ground of fraud, which was applicable only to the supposition * that the coverture commenced either from the sentence or solemn marriage; and the Court of appeal proceeded expressly upon the ground that

the coverture did not commence until the solemn marriage.

I cannot, therefore, doubt but that at the time of this decree, about 1280, it was considered as clear law that a contract *per verba de præsenti* did not constitute a marriage for the purpose of entitling the woman to dower, and that Lord HALE considered the law to be the same at his time.

It has been suggested, that although the words *de præsenti* were used, the agreement may have been to celebrate a future regular marriage, which would have made the contract in substance one *per verba de futuro*. This supposition is inadmissible, cohabitation having followed the contract, which would have given to a contract *per verba de futuro* all the effect of a marriage *per verba de præsenti*.

It has been suggested that the dower to which these cases refer was dower *ad ostium ecclesiæ*, — a singular supposition, when the marriage from which the claim arose was clandestine ; and if it had been or could be so, no explanation would thereby be afforded. The question of the validity of the marriage would be decided by the same rules. Whatever might be the character of the dower claimed, the want of seisin, and not the want of an assignment *ad ostium ecclesiæ*, was the ground of the judgment.

Secondly, a contract *per verba de præsenti* did not give to the man the right of a husband in the property of the woman. This was decided in *Haydon v. Gould*, (a) which occurred in the ninth year of Queen Anne. The parties were dissenters, and the marriage was according to the form of the sect, without the * intervention of any one in holy orders ; * 881 cohabitation followed, but the Ecclesiastical Court held that the man was not entitled to letters of administration to the property of the woman. That decision was affirmed by the delegates.

At this time, in the ninth of Anne, the title of a husband to administer to a wife, which seems to have been at all times recognized, had been confirmed by an Act of Parliament ; the Statute of 29 Charles 2, c. 3, having enacted that the

(a) 1 Salk. 119.

Statute of Distributions, 22 & 23 Charles 2, c. 26, should not extend to the estates of *femes covert* that should die intestate, but that their husbands might demand and have administration of their estates, and receive and enjoy the same as they might have done before the making of that Act; thus recognizing the previous right, or being at least declaratory of it. The only question in the case could have been, Was the woman a *feme covert*, and was the man her husband? That being established, the Ecclesiastical Court would not have had any discretion as to granting administration to the husband; he would have been entitled to a *mandamus* to compel the Ecclesiastical Court to make the grant. *Rex v. Bettsworth*. (a)

The decision, therefore, in *Haydon v. Gould* was, that what had taken place, necessarily including a contract *per verba de præsenti* and cohabitation proved, did not constitute a marriage. The reasoning and suggestion at the end of the case must, I apprehend, be considered as coming from the counsel or the reporter, and cannot affect the weight of the decision. The suggestion that the husband, demanding a right by the ecclesiastical law, must prove himself to be a husband according to that law, if supposed to raise any

* 882 * distinction between marriage by the ecclesiastical law and the common law, cannot be received as the ground of the decision. The Ecclesiastical Courts, being the sole judges of questions of marriage, could not have had different rules as to its validity, according to the form in which the question might be presented to them. Besides which, the husband's right was so established, and so little in the discretion of the Ecclesiastical Courts, that the Common-Law Courts would enforce it by *mandamus*.

The suggestion that the wife and issue might "perhaps" entitle themselves to temporal rights through such a marriage seems only to mean that the Court might in their case be content with the reputation of marriage; without calling upon them to prove its validity, — a distinction recognized in other cases, — for it is said that the husband should not entitle him-

(a) 2 Strange, 891.

self by mere reputation without right. This distinction, if well founded, is not material ; for in the case of the supposed husband, in which the right was examined into, the decision was that there had not been a valid marriage ; that is, that she had not been a *feme covert*, and that he had not been her husband.

The law so decided in 1708, ninth Anne, may be traced from a very early period : for Perkins (*a*) says, that after a contract of marriage between a man and a woman they are not yet one person in law, inasmuch as in case of the woman's death before the marriage solemnized between them, the man to whom she was contracted shall not have her goods as her heir.

These authorities trace the law from 1365 to 1708, and leave no doubt but that by the law, common as well as ecclesiastical, a contract *per verba de præsenti* * did not * 883 establish the relation of husband and wife between the parties.

Thirdly, a contract *per verba de præsenti* between a man and a woman did not confer upon their issue the rights of legitimacy.

This was necessarily included in the decision of the cases of *Foxcroft* (*b*) and *Del Heith.* (*c*) In the first of these a marriage by the Bishop of London, and in the second a marriage by a parish priest, was held invalid, and the issue bastards, because there had not been a marriage *in facie ecclesiæ*. It is obvious that the Courts which so decided must have assumed, and in fact held, that no marriage could be valid by a mere contract between the parties without the intervention of any ecclesiastical authority ; for such a contract existed in both the cases. They therefore clearly show the state of the law at the times they took place. But it is said that these cases are not to be relied upon in the present discussion, because they prove too much, in holding that a marriage could not be valid unless celebrated *in facie ecclesiæ*. It must not be hastily assumed that these decisions went too

(*a*) Tit. Enfeoffm. pl. 194, citing Year Book, 38 Edw. 3, 12.

(*b*) 1 Roll. Abr. 359.

(*c*) Rog. Ecc. Law, 584; Harl. MS. 2117.

far, and were therefore wrong, according to the state of the law at the times they were pronounced; for Perkins tells us (a) that it had been holden in the time of Hen. 3, that if a woman had been married in a chamber she should not have dower by common law, "but the law is contrary at this day;" that is, marriage in a chamber or clandestine, in opposition to a marriage *in facie ecclesiæ*, but without reference to the intervention of a person in orders, whose celebration of clandestine marriages was the subject of frequent denunciations; and when we observe the fluctuation

* 884 * of the ecclesiastical rules upon the subject of marriage, and consider that the Ecclesiastical Court had the exclusive jurisdiction over questions of marriage, we cannot be surprised at these fluctuations in the decisions which took place.

If, however, we assume that these cases went too far; if, as is clearly the case, the larger proposition necessarily includes the minor one, they must be considered as conclusive of the state of the law upon the subject now under consideration. Such decisions could not have been made, indeed the questions which led to them could hardly have been raised, if it had not been considered as certain that a contract *per verba de præsenti*, without the intervention of any person in holy orders, did not at those times constitute a valid marriage so as to make the issue legitimate.

The case of *Bunting v. Lepingwell* (b) falls under this head. The special verdict found that the parties contracted matrimony *per verba de præsenti tempore*; that the woman afterwards married another man, Twede; that Bunting libelled the woman upon the contract; and that "decretum fuit quod prædicta Agnes subiret matrimonium cum præfato Bunting et insuper pronunciatum decretum et declaratum fuit dictum matrimonium fore nullum."

Now, for the reasons which have been given by my noble and learned friend who preceded me, and more particularly from the authority which he has cited from the Court at York, it does appear to me that no reliance whatever is to be

(a) Tit. Dower, § 306.

(b) 4 Rep. 29; Moor, 169.

placed upon that particular expression there used, the word "*fore*." Undoubtedly, according to the ordinary sense of the word, it would * have meant "future," * 885 — "something to be hereafter;" — but, as it has been well observed, that construction cannot be put upon it, because the sentence of the Ecclesiastical Court was to undo the marriage from the commencement. Now, the word "*fore*" would seem to show that it had been good heretofore, but that in future it was to be void; but the effect of the sentence of the Ecclesiastical Court was to make void that which was voidable, declaring it void as if it had never had existence.

Bunting and Agnes intermarried accordingly, and had a son, and the question was as to his legitimacy. Now, if the contract of marriage *per verba de præsenti* had constituted marriage, there could not have been any question; for in that case the marriage between Agnes and Twede would have been void, and the issue of Bunting and Agnes would have been clearly legitimate, not by virtue of the sentence or of the ceremony, but by force of the contract *per verba de præsenti*.

It has been suggested as to that case, as well as to the case in Coke Littleton, (a) that as the parties used words *de præsenti tempore*, the agreement might have been to marry by a future regular marriage, which would have amounted, therefore, only to a contract *per verba de futuro*. Of this there is no trace in either of the reports; and the special verdict, by stating a contract *per verba de præsenti tempore*, and nothing more, precludes any such supposition. The terms have at all times been perfectly well known in the law, and must be taken as used in their ordinary and well-known meaning; but had it been otherwise, the cohabitation which followed would have given the * same * 886 effect to the contract, even if it had been expressed in terms of future promise.

This case proves that in the 27th and 28th Eliz. no doubt was entertained but that a matrimonial contract *per verba de*

(a) 33 a, n. (10).

præsenti did not constitute a marriage so as to legitimize the issue, and make a second marriage between the woman and another man void. Had it been otherwise, the proceedings in the Ecclesiastical Court would not have been material, and the second marriage would have been treated as void, and not only as voidable.

It is also to be observed that the civilian who argued in favour of the legitimacy, as reported in Moor, after stating the rule of the civil law, contended that a child born after the contract and before the espousals, would be legitimate, by the relation of the espousals to the contract, which would make void and adulterous any intermediate marriage, but that if no espousals followed the contract the issue would be illegitimate; and this is adopted by Chief Baron COMYN, for he says, (a) "So by a contract of marriage, it is no marriage if espousals do not afterwards ensue; *semble*, Moor, 170." These authorities establish the third proposition.

Fourthly, a contract of marriage *per verba de præsenti* did not impose upon the woman the incapacities of coverture. Perkins, in the passage before quoted, (b) says, that after a contract between a man and a woman they may enfeoff one another, for yet they are not one person in law, but the wife may make a will without the agreement of him to whom she was contracted.

Bracton, in the passage quoted, "*matrimonium*
* 887 * *autem accipi possit sive sit publice contractum vel fides data quod separari non possunt et revera donationes inter virum et uxorem constante matrimonio valere non debent*," must be understood as describing by the words "*fides data quod separari non possunt*" a good and valid, though a private or clandestine, marriage, as opposed to "*matrimonium publice contractum*;" for he cannot be supposed to have meant a contract of marriage *per verba de præsenti* merely, because he cannot be supposed to have meant that such a contract would have been "*matrimonium*" for the purpose of making invalid gifts between the parties,

(a) Baron & Feme, B. 1.

(b) Tit. Feoff. pl. 194, citing Year Book, 38 Edw. 3, 12.

contrary to the law as laid down in the 38 Edw. 3, as cited by Perkins.

Fifthly, a contract of marriage *per verba de præsenti* did not make the marriage of one of the parties, living the other, with a third person, void.

This proposition, as to the truth of which no doubt has or can be raised, appears to me to be of the highest importance, and to lead irresistibly to the conclusion that such a contract never was considered as constituting a marriage. If a contract *per verba de præsenti* were a marriage for the purpose of giving civil rights and enforcing civil liabilities, it would follow that a marriage between one of the parties to such contract, living the other, with a third person, would be absolutely void. If, therefore, such a marriage was voidable only, and good until set aside, and therefore indissoluble after the death of the parties to it, it follows that, as there cannot be two good marriages of the same person subsisting at the same time, the contract *per verba de præsenti* was not a marriage for the above purpose ; and that such was the case appears to be beyond all doubt.

* In Rolle's Abridgment (a) it is said, a divorce *causâ præcontractûs* bastardizes the issue ; that is, the sentence makes the issue of the second marriage bastards, who were before held to be legitimate. The second marriage was therefore voidable, and not void. * 888

In Coke's Commentary on Littleton (b) it is said, " if a marriage *de facto* be voidable by divorce in respect of precontract or such like, whereby the marriage might have been dissolved and the parties freed *à vinculo matrimonii*, yet if the husband die before any divorce, then, for that it cannot now be avoided, the wife *de facto* shall be endowed, for this is *legitimum matrimonium*." The term used is " precontract," which, it may be said, means a contract *per verba de futuro* as well as a contract *per verba de præsenti*. In this case I apprehend that it clearly means the latter. It appears, indeed, from Swinburne, (c) and what is said in *Holt v. Ward*, (d) that in cases of contract *per verba de futuro*, where no cohabitation

(a) 360 G., pl. 1.

(b) 33 a.

(c) Sect. 17.

(d) 2 Str. 937.

had followed, the Ecclesiastical Court did not compel the parties to come together, or do more than admonish them. It is, at all events, clear that the terms include a contract *per verba de præsenti*, and it is sufficient for the present purpose that the Ecclesiastical Court in such cases, where one of the parties to the contract had subsequently contracted another marriage, set aside the second marriage and enforced the contract; and that if either of the parties to the second marriage died before such marriage was set aside, it remained good and indissoluble. But if so, is it possible that the contract *per verba de præsenti* constituted a marriage? In the case sup-

posed the second marriage was good and indissoluble,

* 889 and if the argument for * the Crown be correct, so

would the marriage alleged to be constituted by the contract; but as both marriages could not possibly be good at the same time, it follows that the contract did not constitute a marriage. This passage from Lord COKE is consistent with the note of Lord HALE, 33 a; whereas if the proposition in that note be erroneous, Lord COKE was also in error. For if the contract constituted a marriage, the second marriage would have been void and not voidable, which it clearly was not. The case before quoted from Rolle's Abridgment, 360 G. *placitum* 1, proves the same thing. It says, a divorce *causâ præcontractûs* bastardizes the issue. They were not bastards till the sentence, and would never become so if there should be no sentence. The second marriage was therefore voidable, but not void.

We have therefore the authority of Lord COKE, that after a contract *per verba de præsenti*, and a subsequent marriage by one of the parties with another person, and a death which prevented the second marriage from being avoided, the wife of such second marriage was entitled to dower; but if the woman party to the contract became very wife, why is she not also to have dower? Issue of the second marriage are legitimate; but if the contract constituted a marriage, so also must be the issue born to the parties to it; that is, there must have been two valid marriages conferring such rights, subsisting at the same time, which is impossible. The authorities prove that such second marriage was not void, but conferred

such rights; the contract therefore did not; that is, it was not a marriage.

In *Bunting v. Lepingwell*, (a) before referred to, no * question was made as to whether the second marriage * 890 was void or not, but it was assumed not to be void; and the question was, whether it had been effectually avoided. If the contract had been considered as constituting marriage, the issue would have been legitimate without reference to the subsequent conduct of the parents. The second marriage was treated as voidable, but not void; and the grounds upon which the legitimacy was contended for, and apparently established, negatived the supposition that the contract *per verba de præsenti* constituted a valid marriage.

The Act 32 Hen. 8, c. 38, which prohibited divorces upon pretence of a former contract, and the Act 2 & 3 of Edw. 6, c. 23, which repealed that Act, and restored the jurisdiction of the Ecclesiastical Courts in such cases, prove the same thing.

In England, the Marriage Act, 26 Geo. 2, c. 33, at the same time prescribed the form of future marriages and abolished all suit to enforce contracts, and thereby by implication abolished divorces *causâ præcontractûs*; the conflict, therefore, between a contract *per verba de præsenti*, and a subsequent marriage, could not arise. But in Ireland, the 58 Geo. 3, c. 81, § 3, in the same manner prohibited all future suits to compel a celebration of marriage *in facie ecclesiæ* by reason of any contract, whether *per verba de præsenti* or *per verba de futuro*. In Ireland, therefore, a marriage after a contract *per verba de præsenti* with another cannot be the subject of a suit in the Ecclesiastical Court; the second marriage, therefore, cannot be disturbed by it, but such second marriage it has been proved was good till set aside, and is therefore now indissoluble. If, therefore, the contract constituted a marriage, there are two marriages, both indissoluble, subsisting at the same time, which is impossible.

* These authorities appear to me to establish the five * 891 propositions, and there is no balance of authority; for

(a) 4 Rep. 29; Moor, 169.

not one single case has been produced tending to negative or to throw doubt upon any one of them, except a passage from Perkins as to the effect of a feoffment after a contract, but which is opposed to decided cases. There are, however, others in which, although the point was not directly raised, the proposition is assumed that contract *per verba de præsenti* did not constitute a marriage.

In *Weld v. Chamberlayne* (a) and *The Queen v. Fielding*, (b) there were contracts *per verba de præsenti*; but Chief Justice PEMBERTON in the one, and Mr. Justice POWELL in the other, did not upon that ground treat the marriages as established, but both marriages were made to depend upon the quality of the minister who officiated.

In *Paine's Case*, (c) if the contract had the effect of a marriage, how could the question have arisen whether the man and woman were husband and wife from the sentence of the Ecclesiastical Court, or from the ceremony, as was the opinion of Mr. Justice TWISDEN? If it had been considered as law that a contract *per verba de præsenti* constituted marriage, it is strange that no allusion should be found to it in the earlier Acts of Parliament referred to by the Chief Justice; and the whole frame of the Marriage Act, 26 Geo. 2, c. 33, seems inconsistent with the supposition. If contracts *per verba de præsenti* and *per verba de futuro subsequente copulâ* had been considered to constitute valid marriages, can it be supposed that no allusion would have been made to this mode of contracting marriage, in an Act the object of

* 892 * which was to prevent clandestine marriages? The

Act provides that there should not be any suit or proceeding in any Ecclesiastical Court made to compel the celebration of any marriage *in facie ecclesiæ* by reason of any contract of matrimony whatsoever, whether *per verba de præsenti* or *per verba de futuro*, which should be entered into after the 25th of March, 1754; but it does not declare that marriages by contract *per verba de præsenti* or *per verba de futuro subsequente copulâ* should be void for the future. By

(a) 2 Show. 300.

(b) 14 St. Tr. 1327.

(c) 1 Siderf. 13.

section 8, it makes null and void all marriages solemnized by any persons, except in the manner prescribed, but takes no notice of marriages arising from contract without solemnization, except in section 13, by prohibiting suits to compel celebration of marriage by reason of such contracts, — a provision very natural if the contract were considered as inoperative till enforced, but not consistent with the notion of the contract itself constituting marriage. So that the Act does not in terms abolish divorces *causâ præcontractûs*, but is supposed to have that effect by implication from the prohibition to enforce the contract. This is observed in a note to Coke Littleton, 79 b.

I have now, I believe, observed upon all the cases having any material bearing upon the present question, which have been produced, of a date anterior to the Marriage Act of the 26 Geo. 2, c. 38, 1753; except the two important ones before Lord HOLT, *Collins v. Jessot*, (a) and *Wigmore's Case*. (b) The first is reported in Salkeld, Modern, and Holt; the other only in Salkeld and Holt; and the reports require to be compared together, in order that the points decided may be fully understood.

* *Collins v. Jessot* was an application for a prohibi- * 893
tion, upon the ground that the Ecclesiastical Court was proceeding upon a marriage contract *per verba de futuro*, for the breach of which the parties had a remedy at common law. It was refused, upon the ground that the Ecclesiastical Court had jurisdiction over marriage contracts, whether *per verba de futuro* or *per verba de præsentî*. The jurisdiction of the Ecclesiastical Court was the only matter in question, in discussing the difference between the two contracts. Lord HOLT's observations must be supposed to have reference to the subject-matter under consideration; namely, the principle upon which the ecclesiastical law proceeded in drawing a distinction between the two contracts. He particularly adverted to the contract *per verba de præsentî* not being releasable between the parties, whereas the contract

(a) 2 Salk. 437; 6 Mod. 155; Holt, 459.

(b) 2 Salk. 438; Holt, 459.

per verba de futuro was releasable ; and he observed that, till released, the party had an option to proceed in the Ecclesiastical or Common Law Courts. This being the question before the Court, and this the reasoning he was pursuing, the expressions so much relied upon were used : “ If a contract be *per verba de præsenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God as if it had been *in facie ecclesiæ* ; with this difference, that if they cohabit before marriage *in facie ecclesiæ*, they are for that punishable by ecclesiastical censures, and if after such contract either of them lie with another, they will punish such offender as an adulterer.”

Wigmore's Case is best reported in Holt, 459. This case also was an application for a prohibition against a suit * 894 in the Ecclesiastical Court for alimony ; the * ground being that there had been no marriage, the man being a dissenter, and the marriage having been by a minister of the congregation not in orders. The result is not stated, but it is obvious that the question must have been as to the jurisdiction of the Ecclesiastical Court. The words attributed to Lord HOLT are, “ by the canon law, a contract *per verba de præsenti*, — as, I take you to be my wife ; I marry you ; or, You and I are man and wife, — is a marriage : so of a contract *per verba de futuro* ; I will take you to be my wife ; or, I will marry you ; if the contract be executed, and he does take her, it is a marriage, and the Spiritual Court cannot punish for fornication ” (not very consistent with what is laid down in *Collins v. Jessot*, that after a contract *per verba de præsenti*, and before marriage, cohabitation was punishable). “ In the case of a dissenter married to a woman by a minister of the congregation who was not in orders, it is said that that marriage was not a nullity, because by the law of nature the contract is binding and sufficient, for though the positive law of man ordains that marriage shall be made by a priest, the law only makes this marriage irregular, and not expressly void ; but marriages ought to be solemnized according to the rites of the Church of England, to entitle to the privileges attending legal marriages, as dower, thirds,” &c.

In endeavouring to ascertain the meaning of the expressions used by Lord HOLT, the reports of these two cases must be taken together, as they relate to the same matter. In *Wigmore's Case*, Lord HOLT tells us that in saying that a contract *per verba de præsenti* was a marriage, he is speaking of the canon law. Now, if the common law were the same, why specify "by the canon law"? Again, he seems to recapitulate the *arguments urged in support of * 895 the validity of a marriage by a dissenting minister; "it is said," &c. But what is his answer to these arguments? "But marriages ought to be solemnized according to the rites of the Church of England, to entitle to the privileges attending legal marriage, dower, thirds, &c." It may be doubtful how far Lord HOLT may be supposed to assent to the proposition which follows the words "it is said;" but beyond all doubt the concluding words above quoted contained the expression of his own opinion; and that is, that for a marriage to be legal, and to give the rights of marriage, such as dower, thirds, &c., it must be solemnized according to the rites of the Church of England. If such were the opinion of Lord HOLT in the 5th of Anne, can it be supposed that he, in *Collins v. Jessot*, in the 2d of Anne, entertained and expressed an opinion directly the contrary? Is it not rather to be assumed that when, in *Collins v. Jessot*, he speaks of a marriage contract *per verba de præsenti* amounting to an actual marriage, he means what in *Wigmore's Case* he expresses, that it is so by the canon law? But let the words be considered as they stand. He is showing the difference between contracts *per verba de præsenti* and *de futuro*; and he says the former amount to an actual marriage, which the parties themselves cannot dissolve by release, whereas they can release the latter sort of contract. To this extent and for this purpose the former is a marriage. When he says that it is as much a marriage in the sight of God as if it had been *in facie ecclesiæ*, does he not mean to draw the distinction between a marriage in the sight of God, and for other or civil purposes; or could he mean to be understood to say that such marriages were good in *the sight * 896

both of God and man? In *Wigmore's Case* he tells us the contrary.

I cannot, therefore, consider Lord HOLT as an authority against the judgment under review; but, on the contrary, I consider the concluding sentence in *Wigmore's Case* (as to the meaning of which there is no ambiguity and can be no doubt) as consistent with and confirmatory of the many cases before cited; which prove, that from the earliest time of which we have any record, down to the passing of the Marriage Act in 1753, no marriage celebrated without the intervention of a person in holy orders was valid for the purpose of conferring civil rights or imposing civil liabilities; for that is the real question: and consistently with the conclusions upon this subject, to which all the cases lead, a contract *per verba de præsenti* may, in the language of civilians and canonists, and even of the common law, be said to be *ipsum matrimonium*; for if, to constitute a marriage effectual for civil purposes, the contract between the parties and the intervention of a person in holy orders was necessary, the contract *per verba de præsenti* was undoubtedly a most essential part of marriage, and partook so much of the essence of it as to be indissoluble. What the civil law considered as the whole, the law of England considered as an essential part of marriage. But if the authorities spread over a period of 700 years are uniform in holding that this essential part, without the intervention of a person in holy orders, did not confer upon the parties the rights of property which belong to husbands and wives, or of legitimacy to their issue, or impose the incapacities of coverture, or render a subsequent marriage of either of the parties void; it is, I think,

* 897 demonstrated that * by the law of England the intervention of a person in holy orders was essential to a marriage for all civil purposes. I have already observed, that from the time of the passing of the Marriage Act in 1753, the question as to the effect of a contract *per verba de præsenti* as constituting marriage was not likely to arise. However high may be the character of Judges, and however entitled to respect their opinions may be, it is obvious that

there is the greatest possible difference between a decision and an opinion expressed, even if the decision be founded upon such opinion; because the judgment may be right, though the reason may be wrong; but if the opinion be not the foundation of the judgment, it is entitled to comparatively but little attention. Decisions ought always to be, and generally are, the result of actual investigation and research; and if they are supposed to be erroneous, one of the parties must have an interest in bringing the subject before another tribunal for revision. But no man is so wise and so well informed that an opinion not essential to the judgment, but thrown out by way of illustration or argument, should be entitled to any comparative degree of weight. It is not likely to have been so much investigated and considered, and it is not capable of being disputed or reviewed.

The first authority subsequent to the passing of the Marriage Act is Blackstone, and passages in his Commentaries are referred to, and relied upon as proof that in his opinion the intervention of a person in holy orders was not necessary to constitute a valid marriage. He certainly does say that any contract made *per verba de præsenti* was before the Marriage Act deemed a valid marriage for many purposes, and that the parties might be compelled in the Spiritual

* Courts to celebrate it *in facie ecclesie*. But after * 898 some observations upon the provisions of the Act, he proceeds thus: "It is held to be also essential to a marriage, that it be performed by a person in orders, though the intervention of a priest to solemnize the contract is mere *juris positivi*, and not *juris naturalis aut divini*;" and he refers to *Haydon v. Gould*. (a)

Now, as there is no provision in the Marriage Act requiring the intervention of a person in orders, and Blackstone states that it was necessary, and refers to *Haydon v. Gould* in support of his proposition, there cannot be a doubt but that he recognized and adopted the law as there laid down, and considered it as establishing the proposition that it was

(a) 1 Salk. 119.

before the Marriage Act essential to a marriage that it should be performed by a person in orders.

It is of the highest importance to understand correctly the case of *Lindo v. Belisario*, (a) as being the great case in which the validity of the marriages of the Jews was considered. It has been much relied upon in the argument for the Crown, as showing what the law was before the Marriage Act, from which Jews are excepted. If the grounds upon which Sir WILLIAM WYNNE and Lord STOWELL proceeded in that case were correct, the case has no application whatever to the present. Both those learned Judges assumed that the validity of the marriage was to depend upon the laws and customs of the Jews. Lord STOWELL, after stating the general law as to marriages, says, "There being then this ceremony, which is more than enough by the law of nature, the question is reduced to this: whether the institutions

* 899 of the Jews hold it to be insufficient?" * and, having required the opinion of persons learned in the Jewish law, he says, "I receive this as information upon foreign law, upon which this Court is to determine." And again he says, "I conceive that the obligation imposed upon me is to apply the peculiar principle of the Jewish law." Now, whether this was or was not the proper principle upon which the validity of a Jewish marriage in this country was to be tried, is quite immaterial to the present case, and upon that I offer no opinion. But as such was the principle acted upon, the fact of the Jewish marriages being held to be good, which appeared to be one of the strongest arguments in favour of the validity of a contract *per verba de præsenti*, must be struck out of the list of arguments in favour of that proposition. If Lord STOWELL had thought the law of England applicable to the case of a Jewish marriage, his decision against the validity of the marriage in that case would have been conclusive against his having supposed that by the law of this country, before the Marriage Act, a contract *per verba de præsenti* constituted a valid marriage. He says, "There is,

(a) 1 Hagg. Cons. Rep. 216.

then, in this state of the parties more than the mere contract *per verba de præsenti* in the Christian church, which was a perfect contract of marriage, though public celebration was afterwards required by the rules and ordinances of the canon law." Lord STOWELL, therefore, found a contract *per verba de præsenti*, but held that it did not constitute a marriage.

I cannot leave this case without referring to the test which Sir WILLIAM WYNNE uses to try the validity of the ceremony, which is directly applicable to this case. "The question," he says, "is, whether the woman is the wife of Belisario. I think it clear from the evidence that she is not. The ceremony which * has passed, although it prevents her * 900 from marrying any other man until a divorce is given, does not give him any authority over her person or property. A man cannot be the husband of a woman without having the civil rights; which he has not. And again, can she be his wife, when it is proved that he has not a right to a penny of her fortune, and that she has a right to dispose of it, and that if she were to die he would have no right at all?"

In *Goldsmid v. Bromer*, (a) Lord STOWELL says, "The parties are both Jews, and both appeal to the Jewish law, by which this question must be decided. The Jews, though British subjects, have the enjoyment of their own laws in religious ceremonies, and the Marriage Act acknowledges this privilege, by excepting them out of its provisions. To deny them the benefit of their own law upon such subjects, would be to deny to a distinct body of people the full benefit of the toleration to which they have long been held to be entitled."

These cases prove that the marriages of Jews have been supported upon grounds wholly inapplicable to the present case. It was assumed that the validity of these marriages would be determined by their own laws and usages, and not by the laws and usages of this country; and Lord STOWELL puts the marriages of Quakers upon the same footing, for in *Jones v. Robinson* (b) he says, "The general law of the Marriage Act makes the marriage by license of minors, without

(a) 1 Hagg. Cons. Rep. 324.

(b) 2 Phill. 285.

consent, null. This clause is restrained as to its effects where the parties are Quakers or Jews ; that is, where they are both so ; they having rights of marriage of their own."

It is to be regretted that with respect to the marriages * of Quakers, we have not the benefit of that investigation which marriages of Jews have received in the case of *Lindo v. Belisario*. If, indeed, there had been any decision in favour of those marriages, upon the ground that by the law of England contracts *per verba de præsenti* before the Marriage Act constituted a valid marriage, such decisions would have been directly in point, and would require to be weighed against the other decided cases in which the contrary appears to have been held ; and had such marriages been capable of being supported upon that ground, no doubt could have existed as to their validity. But we find, in *Hutchinson and Wife v. Brookebanke*, (a) Quakers, after a regular marriage according to their forms, prosecuted in the Ecclesiastical Court for fornication, and a prohibition granted upon the question whether they were not protected by the Toleration Act of 1 & 2 W. & M. c. 18 ; and when the legality of Quaker marriages came before Lord MANNERS in *Houghton v. Houghton*, (b) anxious, as he evidently was, that no doubt should be entertained of the legality of those marriages, he rested it entirely upon the construction of certain Acts to which he referred, and did not allude to the supposed common-law foundation for them.

In the case before Lord HALE, in which a special verdict was found upon the validity of a Quaker marriage, the course he adopted, and the expressions used by him, show the difficulty he had in supporting the validity of the marriage, and at the same time the strong desire he felt to do so. But it also appears from this case, that it did not occur to him that they could be supported upon the mere proof of a con-
 * 902 tract * *per verba de præsenti* or *de futuro cum copulâ*, which must have been in evidence ; for he is reported to have said, that he thought that all marriages made according to the principles of men severally should be held good,

(a) 3 Lev. 376.

(b) 1 Moll. 611.

and receive their effect in law,—a rule very much resembling that acted upon by Sir WILLIAM WYNNE and Lord STOWELL in *Lindo v. Belisario*, but very far removed from the principle that the mere contract would operate as a marriage; because, as the contract must be a part of all marriages, there could not, in giving to the contract the effect of marriage, be any question of considering the principles of the parties to it; and in *Jones v. Robinson*, before cited, Lord STOWELL says, Jews and Quakers have rights of marriage of their own.

It is impossible, however, not to feel the importance of the fact that such marriages have been recognized in several cases. I have felt it to be very difficult to be explained, consistently with the judgment below; but as I do not find these marriages established upon the ground that the contract was sufficient without the intervention of a person in holy orders, but, on the contrary, find their validity referred to other grounds peculiar to them, and observe the terms used with respect to these marriages in the Acts from the operation of which they are excluded, I cannot think the argument arising from them sufficient to affect the many authorities to which I have referred.

Lord ELLENBOROUGH is supposed, in *The King v. Inhabitants of Brampton*, (a) to have expressed an opinion in favour of the validity of a marriage *per verba de præsenti*, without the intervention of a person in holy orders. I do not so understand that case, * nor was that point in * 908 question, for the ceremony was performed by a person apparently a clergyman. If he had supposed the intervention of a priest unnecessary, for what purpose did he discuss the result of the evidence of the person who officiated being in orders; or refer to *The King v. Fielding*, (b) to prove that a marriage by a Roman Catholic priest before the Marriage Act was effectual for the purpose of making the marriage valid?

The opinion of Lord STOWELL, in *Dalrymple v. Dalrymple*, (c) has, I think, been supposed to be much more deci-

(a) 10 East, 282.

(b) 14 Sta. Tr. 1327.

(c) 2 Hagg. Cons. Rep. 54.

sive in favour of the validity, as a marriage, of a mere contract *per verba de præsenti*, than, upon a careful examination of what he there says, it appears to be. He says that the law of England retained such rules of the canon law as had their foundation, not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage; and that the Ecclesiastical Courts enforced those rules, and, amongst others, the rule which held an irregular marriage, constituted *per verba de præsenti*, not followed by any consummation, valid to the full extent of avoiding a subsequent regular marriage contracted with another person. The same doctrine, he says, was recognized by the Temporal Courts; and, after referring to *Bunting's Case*, adds, "Though the common law certainly had scruples in applying the civil rights of dower, community of goods, and legitimacy, in the case of these looser species of marriage." There is, however, no doubt but that his high authority is properly urged against the judgment.

In *Latour v. Teasdale*, (a) Sir VICARY GIBBS, professing to take the law from *Dalrymple v. Dalrymple*,
 * 904 * certainly seems to assume that a contract *per verba de præsenti*, without more, would, before the Marriage Act, have constituted a valid marriage; but there was no such question in the case before him; the case reserved at the time, upon which the opinion of the Court was given, having stated that the ceremony was performed by a Roman Catholic priest, which had been held sufficient.

I do not think it necessary to advert to all the modern cases in which eminent Judges have expressed opinions favourable to the proposition contended for on behalf of the Crown. Ever since the case of *Dalrymple v. Dalrymple*, there has naturally been a prevailing opinion consistent with what was supposed to be the doctrine of so great an authority as Lord STOWELL. The question in these cases was not the subject of investigation and argument, such as we have had the benefit of in this case; and the opinions so expressed were rather assents to the doctrine so laid down,

(a) 8 Taunt. 830; 2 Marsh. 288.

from the deference to the authority from which it proceeded, than from any judgment exercised as to the grounds upon which it was founded. Those grounds have now been examined; and if Lord STOWELL really entertained the opinion which has been attributed to him, it will afford a strong instance of the difference of weight which ought to be attributed to an opinion essential to the support of the judgment pronounced, and one advanced by way of illustration or argument; for as such only could the state of the English law before the Marriage Act have been pertinent to the question before him. If, upon examining the grounds of the opinion so expressed, notwithstanding the extent to which it has been adopted by other Judges and by the profession of the law at large, it shall be found that it is contrary to the law as established by * formal decisions, I think that this * 905 is not a case in which the course, often wisely adopted, of adhering to repeated decisions, although disapproved, in preference to disturbing rules supposed to be established, ought to be followed. That can only be right where there have been actual decisions, and not where there have only been opinions casually expressed. What has taken place in England is indeed evidence of what the law of Ireland really is, but it is no otherwise binding, and we have to decide in a criminal case what that law is; whether by the common law of Ireland, which is the same as the common law of England, the first marriage was a legal marriage. I cannot hold the affirmative of this proposition because many eminent Judges have expressed opinions in favour of that conclusion, when I find, from the time of the Saxons to the passing of the Marriage Act in 1753, a succession of authorities and decisions against it, without one in its favour. And it must be observed, that notwithstanding the opinions so expressed, there has been a course of dealing with the subject very inconsistent with the state of the law as assumed in those opinions. We hear of actions by women for breach of promise of marriage after a contract *de futuro* and cohabitation; that is, an action by a wife against her husband for a breach of a promise to marry, the marriage being by the supposition complete. It is difficult to conceive how in such case there could be a

contract to support the action, which would not, with the cohabitation, be a marriage according to the supposed law. Then there are Acts relating to Quakers, in which their marriages are called pretended marriages; and many respecting marriages of dissenters, and of persons in the colonies, which would be wholly useless if a contract could

* 906 * constitute a marriage. It is true that many of these

Acts are declaratory; but as they were intended to confirm past marriages as well as to establish regulations for future ones, that form was very naturally adopted. I do not observe upon these Acts in detail. They have been commented upon by the Lord Chief Justice, in giving the opinion of the Judges. They do not, indeed, prove that a mere contract could not have the effect of a marriage, but they certainly show a state of uncertainty not consistent with the unhesitating opinions which have fallen from some Judges in the later cases.

It was urged that marriages were good where the person officiating was not in orders, though pretending and believed to be so. This, I apprehend, depends upon a very different principle. The Court in such a case would not, I conceive, permit the title to orders to be inquired into.

If I am right, that by the law of England the intervention of a person in holy orders was necessary to constitute a binding marriage, there is not, I think, any difficulty in coming to the conclusion that such person must be in orders recognized by the Church of England. The necessity of such intervention, if it exists, must have arisen from regulations of the church, in whose Courts all questions of marriage were decided; and when the church speaks of persons in holy orders, those only can be intended whom the church conceives to be clothed with that character, in which number members of the Presbyterian church are not included.

I have now concluded what it appeared to me to be proper to address to the House upon this most difficult and important

case. I have with great reluctance found myself compelled to adopt the opinion I have * expressed. I am aware of the difficulties and hardships to which affirm-
ing the judgment may lead. Happily it will be within the

power of the legislature to remove those difficulties, and to avert those hardships. (a) We have here but one duty to perform, to declare what we believe to be the law; and in the performance of that duty I am bound to declare, that in my opinion the first marriage in this case was not a valid marriage in law; and therefore that the party was not legally guilty of the offence with which he was charged, and that the judgment ought to be for the defendant in error.

“It was ordered and adjudged by the Lords, that the judgment given in the said Court of Queen’s Bench be, and the same is hereby affirmed. And that the record be remitted, to the end such proceedings may be had thereupon as if no such writ of error had been brought into this House.”
— *Lords Journals*, 29 March, 1844.

In the case of *The Queen v. Carroll*, the order of the House states that, “regard being had to the judgment,” in *The Queen v. Millis*, the judgment of the Court of Queen’s Bench was affirmed.

[The entry on the Minutes of Proceedings of the 29th March is in this case more full than the entry on the Journals, and is in the following form :—“*Reg. v. Millis* (writ of error). The order of the day being read for the further consideration of this case, the House proceeded to take the same into consideration. And it being moved to reverse the judgment complained of, the same was objected to, and the question was put whether the judgment complained of shall be reversed? The Lords COTTENHAM and CAMPBELL were appointed to tell the number of votes; and upon report thereof to the House, it appeared that the votes were equal; that is, two for reversing and two for affirming. Whereupon, according to the ancient rule in the law, *Semper præsumitur pro negante*, it was determined in the negative. Therefore the judgment of the Court below was affirmed, and the record remitted.”]

(a) An Act has since been passed (7 & 8 Vict. c. 81), entitled “An Act for Marriages in Ireland, and for registering such Marriages;” by the fourth section of which marriages between parties, one or both of whom are Presbyterians, may be solemnized in certified Presbyterian meeting-houses. The 5 & 6 Vict. c. 113, the 6 & 7 Vict. c. 89, and the 3d section of the 7 & 8 Vict. c. 81, severally confirm marriages celebrated by Protestant dissenting ministers in Ireland, up to the time of passing the last-named statute.

• 908 • THE IRONMONGERS' COMPANY v. HER
MAJESTY'S ATTORNEY-GENERAL.

1844.

THE IRONMONGERS' COMPANY *Appellants.*
HER MAJESTY'S ATTORNEY-GENERAL at the } *Respondent.*
relation of DANIEL HUMPHREYS HOWLETT . }

Charity. Failure of Object. Substitute. Cy-pres.

A testator gave the residue of his estate to an incorporated company in the city of London, upon trust, to apply one moiety of the income to the redemption of British slaves in Turkey or Barbary ; one fourth part to the support of charity schools in the city and suburbs of London, where the education is according to the Church of England, not giving to any one above 20*l.* a year ; and, in consideration of the company's care and pains in the execution of his will, out of the remaining fourth part, to pay 10*l.* a year to such minister of the Church of England as should from time to time officiate in their hospital, and the rest to necessitated decayed freemen of the company, their widows and children, not exceeding 10*l.* a year to any family. And the testator positively forbade his trustees to diminish the capital by giving away any part of it, or to apply the income to any use or uses but those mentioned in his will. The income of a moiety of the residue having for several years been suffered to accumulate in consequence of there being no British slaves in Turkey or Barbary, an information was filed for the administration of the charity estate, including the accumulations of that moiety ; and it appearing that there were no such British slaves to be redeemed, and no other object having been suggested which, in the opinion of the Court, bore any resemblance to the redemption of such slaves, it was declared that, after setting apart a certain sum out of that moiety and its accumulations, to provide a fund for the redemption of any British subjects who might thereafter be held in slavery in Turkey or Barbary, the income of the surplus of that moiety and its accumulations ought to be applied in supporting and assisting charity schools in England and Wales, where the education was according to the Church of England, but not to an amount of more than 20*l.* a year to any one school.

The Lords, affirming that declaration, agreed that the income of the moiety could not be applied to any other purpose more in conformity

with the testator's intentions, and with the object of the charity that failed.¹

A Court of Appeal is not disposed to disturb a decree which depends on the discretion of the Judge, and not upon principle.

June 4, 7, 1844.

THOMAS BETTON, of the parish of St. Leonard's, Shore-ditch, London, by his will, dated the 15th of February, * 1728, disposed of his residuary estate in the * 909 following words: "I give and bequeath the rest and residue of my estate, wheresoever and whatsoever, to the worshipful Company or Corporation of Ironmongers, of the city of London, and to their successors, making them my executors; upon this special trust and confidence in them reposed, that is to say, that they do, with all convenient speed that may be after my decease, place my estate out at interest upon good security, positively forbidding them to diminish the capital sum by giving away any part thereof, or that the interest and profit arising be applied to any other use or uses than hereinafter mentioned and directed; viz., that they do pay one full half part of the said interest and profit of my whole estate yearly and every year for ever, unto the redemption of British slaves in Turkey or Barbary; one full fourth part of the said interest and profit yearly and every year for ever, unto charity schools in the city and suburbs of London, where the education is according to the Church of England, in which number that in this parish to be always included, and not giving to any one above 20*l.* a year; and in consideration of the said Ironmongers' Company's care and pains in the execution of this my will, the other fourth part of the said interest and profit yearly and every year for ever, to the uses following; viz., 10*l.* a year to such minister of the Church of England as they shall from time to time entertain in their aforesaid hospital for performing divine service and other duties belonging to that holy order, the remains unto necessitated decayed freemen of the

¹ This subject is exhaustively discussed, and the authorities bearing upon it are cited, by Mr. Justice GRAY, in *Jackson v. Phillips*, 14 Allen, 639; see *Perry Trusts*, §§ 724-728.

said company, their widows and children, not exceeding 10*l.* a year to any family."

The testator's residuary estate, exceeding 20,000*l.*, was vested by the trustees in proper securities for the
 * 910 * purposes of the charities, and two fourth parts of the proceeds have been regularly applied as directed by the will; but with respect to the other moiety of the proceeds, the objects for the application thereof having failed, the trustees, after applying part thereof in aid of the other objects of the testator's bounty, accumulated the remainder, and invested the same from time to time, to a very large amount; so that the income of the original moiety, together with the income of the accumulated fund, amounted in 1829 to 3500*l.* a year.

In November, 1829, the Attorney-General exhibited his information in the Court of Chancery against the appellants, thereby stating the said will, and also stating, amongst other things, that by certain treaties entered into between this country and Turkey and the States of Barbary, all dealing and trafficking in slaves was prohibited; and that, therefore, the half part of the interest and profits of the testator's estates directed to be applied to the redemption of British slaves in Turkey or Barbary, could not be applied according to such direction; and praying that the usual accounts might be taken of the estates of the testator, and of the rents, profits, and revenues thereof, and that it might be declared that one moiety of such rents and profits, and revenues, was applicable to the purposes of the charity, as near to the intention of the testator as the circumstances of the case would admit; and that a scheme might be settled for the future application of such rents, profits, and revenues.

The appellants having put in their answer to the information, the cause came on for hearing on the 19th of July, 1830, before the then Master of the Rolls, when by a decree of that
 date it was referred to the Master to inquire whether
 * 911 the whole or any part * of the income of the moiety of the charity estates and funds, and of the accumulations thereof, could then be applied to the redemption of British slaves; and if not, then he was to consider what would be

the most proper application of the income of such moiety and the accumulations thereof, or of such part as could not then be so applied, regard being had to the testator's will, and the Master was to approve of a scheme accordingly; and it was ordered that the Master should inquire whether such scheme could be carried into effect without the aid of Parliament.

The Master made his report in July, 1833, and thereby certified that it did not appear to him that there were then any British subjects held in slavery in Turkey or Barbary, and that, therefore, no part of the charity estates and property could then be applied to the use contained in the will; but inasmuch as there had been British subjects held in captivity in Turkey and Barbary, as the report mentioned, he was of opinion that it would be proper to set apart 7,000*l.* three per cent annuities, in order that the dividends and income thereof might form a fund to provide for the redemption of any British subjects who might thereafter be detained in slavery in Turkey or Barbary; and the Master stated that a scheme had been laid before him, on the part of the appellants, for applying the surplus income of such moiety and accumulations to the other objects in the will; viz., one moiety thereof to the charity schools in London, where the education is according to the Church of England, in the same manner as the one-fourth of the trust funds given by the will for that purpose had been applied; and the other moiety, as to 40*l.* part thereof, in the augmentation of the stipend of the chaplain, and as to the remainder thereof, unto necessitated * decayed freemen of the company, and * 912 their widows and children: and that, on the part of the relator, a scheme had been laid before him (to the purport in the report mentioned); and he certified that he approved of the scheme of the appellants, subject to the setting apart of the 7000*l.* for the above-mentioned purpose, in case the Court should so think fit; and that he was of opinion that such scheme could be carried into effect without the aid of Parliament.

The cause came on to be heard before the Master of the Rolls, for further directions on the report, on the 29th of

July, and again on the 12th of November, 1833, (a) when by a decree of the latter date it was declared that the Court had no jurisdiction to apply the surplus income (b) of the moiety of the charity property and the accumulations thereof, to any purpose inconsistent with the intention of the testator, expressed as to the application of that moiety to the redemption of British slaves in Turkey or Barbary: and it was referred back to the Master to settle and approve of a proper scheme to be submitted to Parliament for the application of the residue of the income of such moiety, and the surplus of the accumulations thereof, and of the income of such surplus and accumulations, after setting apart 7000*l.*: and it was ordered, that so much of the Master's report as related to setting apart 7000*l.* as a fund to provide for the redemption of any British subjects who might thereafter be detained in slavery, in Turkey or Barbary, be confirmed.

Against the first part of this decree, the appellants appealed to the Lord Chancellor (Lord BROUGHAM): and his * 913 Lordship, by a decree pronounced on the 18th * of November, 1834, (c) reversed the same, and in lieu thereof declared that the Court had jurisdiction to apply the surplus income of the moiety of the charity property in question, and the accumulations thereof, as near as might be to the intention of the testator, having regard to the bequest touching British captives, and also to the other charitable bequests in the will. And it was ordered that the cause be remitted, to be reheard by the Master of the Rolls, on further directions on the said report, on the footing of this declaration, without disturbing the other directions of the decree.

The cause was reheard accordingly by the Master of the Rolls (Sir C. C. PEPYS); and by an order made upon such hearing, and dated the 1st of May, 1835, it was referred back to the Master to review his report as to the scheme thereby approved of for the application of the surplus moiety of the charity property and accumulations thereof, and of the divi-

(a) 2 My. & K. 576.

(b) Above the 7000*l.*

(c) 2 My. & K. 581 *et seq.*

dends and income thereof, having regard as near as might be to the intention of the testator as to the bequest contained in his will touching British captives, and having regard also to the other charitable bequests in the will.

The Master made a separate report in August, 1839, and thereby certified that there were no direct objects to which the surplus moiety and the accumulations thereof, and the dividends and income thereof, could be applied; and he further certified that, if the true construction of the last-mentioned order should be, that he was bound, in the first instance, to consider the application of the surplus moiety, and the accumulations thereof, &c., in reference only to the intention of * the testator, as to the bequest contained * 914 in his will touching British captives; and if the case of *The Attorney-General v. Gibson*, (a) cited before him, was a case which should appear to the Court as applicable to the present case; the application proposed by a scheme brought in by the trustees of the Mico charity, was an application as near as might be to the intention of the testator as to the bequest contained in his will touching British captives, provision being first made for the increase of the comforts of such of the pensioners in Greenwich Hospital as were present at the battle of Algiers, and for the education (at the schools in the report mentioned) of the children of such officers and men as were present at that battle: but he submitted to the Court, whether a portion of the surplus moiety, and the accumulations thereof, &c., might not in such case be properly applied for the benefit of the Seamen's Hospital Society and the Royal Naval Benevolent Society, at least in respect of the last-mentioned charities, so far as respected the officers and men engaged at the battle of Algiers and their families. But if the case of *The Attorney-General v. Gibson* should not appear to the Court as applicable to the present case, or if the true construction of the said order should be, that he (the Master) was bound to consider of the application of such surplus moiety and the accumulations thereof, and of the dividends and income thereof, having regard as near as might

(a) 2 Beav. 317, n.

be to the intention of the testator, as to the bequest contained in his will touching British captives, and having regard also to the other charitable bequests in the will, whether the case of *The Attorney-General v. Gibson* should or not appear * 915 to the Court applicable to the present case; * then he found, subject to the provision being made for the increase of the comforts of such of the pensioners in Greenwich Hospital as were present at the battle of Algiers, and the education of their children at such schools as therein before mentioned, and also subject to the submission therein before mentioned as to the Seamen's Hospital Society and the Royal Naval Benevolent Society, that the proper application of the surplus moiety and the accumulations thereof, &c., would be for the better support of the charity schools in the city and suburbs of London, where the education is according to the Church of England, including the school of the parish where the testator dwelt, and the Royal Naval School, and the school attached to Greenwich Hospital; and he further certified that, save as aforesaid, there were no objects to which the surplus moiety, &c., could be applied, having regard to the directions contained in the order of the 1st of May, 1835.

The appellants filed exceptions to that report, which were heard before the Master of the Rolls, who thereupon made a decree, (a) dated the 14th of December, 1839, whereby it was declared that there were no direct objects to which the income of the moiety of the charity estates and funds, and the accumulations thereof, could be applied, regard being had to the bequest in the will of the testator touching British captives; and it was declared that the scheme proposed by the appellants, and mentioned in the report, so far as it proposed the appropriation of the income of the moiety and the accumulations thereof to the charity schools in the city and suburbs of London, where the education is according * 916 to the Church of England, and * to the necessitated decayed freemen of the Ironmongers' Company, their widows and children, was a proper scheme for the application

(a) 2 Beav. 313.

of the income of such moiety and the accumulations thereof, and of the income and dividends thereof, as near as might be to the intention of the testator, having regard to the bequest contained in his will touching British captives, and having regard also to the other charitable bequests in his will; and it was referred back to the Master to review his report, and to approve of a scheme for such application.

The respondent appealed to the Lord Chancellor (Lord COTTENHAM) against that decree; and his Lordship, by decree dated the 23d of January, 1841, (a) reversed the same, except so much thereof as declared that there were no direct objects to which the income of the moiety of the charity estates and funds, and the accumulations thereof, could be applied, regard being had to the bequest in the will of the testator touching British captives; and in lieu of the part so reversed, it was declared that the half-part of the rents, interest, and profits of the testator's property, which by his will is directed to be applied to the redemption of British slaves in Turkey or Barbary, and the interest and profits of the accumulations thereof, ought to be applied in supporting and assisting charity schools in England and Wales, where the education is according to the Church of England, but not to an amount of more than 20*l.* a year to any one school; and it was referred back to the Master to settle and approve of a scheme for that purpose.

The present appeal is against the latter decree.

Mr. Kindersley and *Mr. J. Adams*, for the appellants, * submitted that the proper course would be to reverse * 917 the Lord Chancellor's order, and restore that of the Master of the Rolls. Both orders agreed in so much of the Master's report of 1839 as found that there were no direct objects to which the income of the one moiety of the charity property and the accumulations thereof could be applied, regard being had to the bequest touching British captives. Both orders also agreed in rejecting so much of that report as suggested conditionally that part of the same income should

(a) 1 Cr. & P. 219 *et seq.*

be applied in aid of the Mico charity, and of Greenwich Hospital, the Seamen's Hospital Society, and the Royal Naval Benevolent Society: it is now indeed agreed on all sides that such applications would not be within the scope of, or near to the testator's intentions as to the redemption of British captives. But the two orders differed materially as to another part of the Master's said report; which was only a repetition of a finding in the report of the former Master, in 1833. The Master of the Rolls, by his order, confirmed the approval by both Masters of that part of the appellants' scheme which proposed the appropriation of the surplus income of the moiety of the charity funds, first, to the charity schools in the city and suburbs of London, where the education is according to the Church of England; and secondly, to the necessitated decayed freemen of the Ironmongers' Company, their widows and children. The Lord Chancellor rejected altogether this second application of the funds, and declared that the whole income of the moiety of the testator's property, which by his will was directed to be applied to the redemption of British slaves in Turkey and Barbary, should be applied in

supporting charity schools not merely in London, but
 * 918 all over England and Wales, where the * education is according to the Church of England. The question now is which of these schemes is, upon the true construction of the will, nearer to the testator's intention.

It must be remembered that by the first order of reference in July, 1830, and by the orders of the Lord Chancellor in November, 1834, and of the Master of the Rolls in May, 1835,—none of which orders has been ever appealed from,—it was declared that in any scheme for the application of this moiety of the charity property, regard should be had to the will; not only to the bequest touching British captives, but also to the other charitable bequests contained in the will. The latter consideration is altogether put aside by the Lord Chancellor, in pronouncing the order now under appeal. His Lordship, after recapitulating the previous orders, states the principle upon which his order proceeds: he says, (a) "If

(a) Cr. & P. 222.

several charities be named in a will, and one fail for want of objects, one of the others may be found to be *cy-près* to that which has failed; and if so, its being approved by the testator ought to be an additional recommendation; but such other charity ought not," his Lordship conceives, "be preferred to some other more nearly resembling that which has failed." His Lordship says that in this case, "the first subject to be considered is the intention of the testator, to be discovered from the gift in favour of British slaves; subordinately to which, and, if possible, consistently with it, the other charities are to be considered." Assuming this to be the rule, he says, "the first charity is most general in its objects, being applicable to all British persons who should happen to be in a particular situation; that the second is limited to persons in London and its suburbs; and * that the * 919 third is confined to freemen of a particular company in London. It would seem, therefore, that although there is no possibility of benefiting the British community at large in the mode intended by the testator, it would yet be more consistent with his intention that the same community should enjoy the benefit of his gift in any other way than that it should be confined to any restricted portion of such community. In considering the manner in which such benefit should be conferred, it is very reasonable and proper to look to other provisions in his will, in order to see whether he has indicated any preference to any particular mode of administering charity." His Lordship then proceeds, and comes to the conclusion "that the third gift could not be referred to in settling a scheme for the application *cy-près* of the funds intended for the first," and "that the second gift should be looked to as indicative of the kind of charity proposed by the testator;" and subsequently his Lordship says, "a charity may be *cy-près* to the original object, which seems to have no trace of resemblance in it." (a)

[THE LORD CHANCELLOR. — The principle and result of that judgment is, that you cannot extend the first object of this

(a) Cr. & P. 227.

charity, because you find nothing analogous or *cy-près* to it, but you can extend the second, as you find in it something *cy-près* to the first.]

There being several charitable bequests, can the Master, under the directions given him, say he would look to all the objects, and select one or more as *cy-près* to one which failed? If the Master had done so, the Court would say he did not observe the directions, and would allow exceptions to
 * 920 his report ; * or, if there were no exceptions, it would be open to the Court, when the cause came before it on further directions, to rectify the report. If the Master overlooks one object, he may overlook two or more, whereas he ought to proceed on the clear exigency of the decree of reference.

[THE LORD CHANCELLOR. — May not the Master consider the third object of the charity in the nature of remuneration for trouble, and not such a charity as he ought to attend to in seeking objects *cy-près* to that which failed ?]

In applying the doctrine *cy-près*, the intention of the testator must be looked to ; and if his charity cannot be applied exactly in accordance with his intention, it ought to be applied as nearly thereto as possible.

[THE LORD CHANCELLOR. — I see by the report, (a) that the way in which the Lord Chancellor put the matter quite agrees with the view I had taken before I saw the report.]

A different course was laid down for the application of surplus moneys *cy-près*, in the cases of *The Attorney-General v. The Coopers' Company*, (b) *Mills v. Farmer*, (c) *The Attorney-General v. Dixie*, (d) and *The Attorney-General v. The Bishop of Llandaff*. (e) Lord Chancellor BROUGHAM, in his statement

(a) Cr. & P. 228.

(b) 19 Vesey, 189.

(c) 19 Vesey, 483.

(d) 2 My. & K. 842.

(e) Cited 2 My. & K. 586.

of the last-named case, says it is like the present, and he cites it to support his view of the doctrine of *cy-près*.

The effect of this decree is to exclude the third expressed object of the charity from any share in the surplus moneys arising from the failure of the first; and, without looking out for any object analogous to the first, to adopt the second object as *cy-près* to the * first, without seeking out * 921 what is most analogous to that second object. There being schools in the city and suburbs of London to exhaust the surplus moneys, why should the schools all over England and Wales be held to be *cy-près* to the first and second object? The proper test of the *cy-près* application is this: what would the testator declare at the time of making his will, if he were told then that the first object of his charity would fail? Would he give it to the schools all over England and Wales, or to those of London, to which he made the second gift? Let it be remembered that he was a London merchant, trading to the Mediterranean. He may have been himself a captive in Barbary, and therefore made a bequest for the redemption of such captives. He may have been born in London, or have come there a poor boy: he certainly was an inhabitant there, attached to the place where he acquired his fortune, and desired to be buried there and a monument to be erected to him; and for all these reasons he made a charitable gift to the London schools. There is no ground for supposing that he had any general philanthropic view of benefiting the whole British community. There is no such universality of charity discoverable in his will; all his bequests in charity were confined to those persons who came within the description of the objects in his will, and had capacity to take by being British slaves in Turkey or Barbary; by being inhabitants of London or the suburbs; or freemen of the Ironmongers' Company.

The first bequest having failed for want of objects, the duty of the Court is to look for some analogous objects, and, none being found, then to adopt the second object and what is *cy-près* to it, or all the existing objects of the charity.

That principle is distinctly * laid down by the counsel * 922 in argument, and by the Lord Chancellor in his judg-

ment on the appeal in 1834. (a) The proper application of the doctrine of *cy-près* is, that you are to look to the objects of the testator, and to what comes near to these objects.

[LORD COTTENHAM. — No, *cy-près* means as near as possible to the object which has failed.]

The question is whether the object proposed to be adopted as *cy-près* has any analogy to the object that failed.

[LORD CAMPBELL. — Then if you find nothing analogous to the object which failed, are you not to look to the second and third objects?]

Certainly, and therefore the third object of the charity ought to be looked to; both objects that exist, the schools in London, and the poor freemen of the Ironmongers' Company, are sufficient to exhaust the whole surplus fund. The words of the will, directing the income to be applied to no other uses, favour this construction.

Mr. C. P. Cooper and *Mr. Spurrier*, for the respondent, the relator, (b) referred to the arguments and the judgment in the Court below, not thinking it necessary to repeat them. They then proceeded to observe that it is a well-established principle of Courts of Equity, that where a testator has bequeathed property to different definite charitable purposes, some of which have failed, the property destined to the purposes which have failed is to be applied to other charitable purposes, as nearly as may be in conformity with the intention of the testator, as such intention is to be collected * 923 from his will. In the present case, by the * order of the 1st of May, 1835, the Master was, in accordance with that principle, directed, in settling a scheme, "to have regard, as near as might be, to the intention of the testator,

(a) 2 My. & K. 583, 586; Cr. & P. 219, 222.

(b) The Attorney-General took no part in the appeal.

as to the bequest contained in his will touching British captives, and to have regard also to the other charitable bequests in the will." The testator, in bequeathing a fourth part of his residuary property "in consideration of the Ironmongers' Company's care and pains in the execution of his will," manifested rather the remuneration of those on whom he imposed the burden of carrying his will into execution than the establishment of a charity; but the respondent does not contend against its being a charity. The real charitable purposes directly contemplated as such by the will are two, — the redemption of British slaves in Turkey or Barbary, a purpose which has wholly failed, and the support of schools in London and its suburbs for education on the principles of the Church of England; and the bequest to such last-mentioned charitable purposes affords therefore the only guide to be found in the will to the intention of the testator.

Mr. Kindersley, in reply, proceeded to state his views of the doctrine of *cy-près*.

THE LORD CHANCELLOR. — My view of the doctrine of *cy-près* is, not that the Judge looks to one object only of the testator, but to all the objects specified in the will.

Mr. Kindersley. — It seems as if this testator, after making the two first charitable gifts, was considering how he could remunerate the company for the trouble of administering those charities, and it occurred to him to give a bequest to the freemen of the Ironmongers' Company. In Lord Craven's will, — the subject of the *suit of *The* *924 *Attorney-General v. The Bishop of Llandaff*, — there was a bequest to increase the scholarships of Oxford and Cambridge, besides a gift for the redemption of British captives; on failure of the latter object, the Court directed that gift to be applied to the further increase of the scholarships. The true mode of ascertaining the proper application of the surplus fund is to consider what the testator would do, if at the time of making his will he were informed that the first object failed.

THE LORD CHANCELLOR. — It is clear that he did not contemplate this state of things; how, therefore, can you collect his intention at the time? How can you tell what would have been his intention if he had foreseen this state of things? We may look at his disposition in the will to see what his charitable inclinations were, and, having ascertained them, then we must provide something corresponding with our opinion of those charitable inclinations. You cannot talk of his intention with respect to something that he never contemplated. The true mode is to consider what he did, and from what he did to collect what were his inclinations with regard to charity.

Mr. Kindersley. — The reason why you would do that is, because by that means you have some chance of ascertaining his intention.

THE LORD CHANCELLOR. — One inclination was to establish schools for the purpose of education in a limited district; one was for providing for necessitous and decayed freemen of a company in London; another was to provide for the liberation of British persons held in slavery in Barbary. Those were the three dispositions. His charitable inclinations, therefore, were directed to those objects. ●

* 925 * **LORD CAMPBELL.** — But the three are all so separate and distinct, that it deserves consideration whether the fund for the one that failed is not to be disposed of as if it had been the single object of the will.

THE LORD CHANCELLOR. — The one which has entirely failed was more comprehensive in its range than either of the others; therefore, when you are supplying that, it is very natural to substitute something that would, to a certain extent, be equally comprehensive. Then if you take education as one of the defined objects, though confined within a limited range, that was one of his charitable inclinations; that which has failed had a more extensive range; then it is very natural to say, let us provide for a charitable education, but let us

give it a more extensive range than that which he has fixed. That appears to me to be very reasonable.

LORD CAMPBELL. — If education in England be next to redemption of slaves in Barbary, it is next at a great interval.

THE LORD CHANCELLOR. — As to the redemption of slaves in Barbary, we can do nothing with that object; it has failed entirely; but the other object of the charity, the range of it, may be made more extensive. As you cannot have any thing analogous to redemption of slaves in Barbary, that which is to be substituted should be in a degree as extensive. In a case of this kind, where there is so much of conjecture and of discretion, it is very difficult to say that you should set aside a decree that is actually pronounced; because, after all, it would be substituting conjecture and discretion for conjecture and discretion.

LORD BROUGHAM. — That would apply equally to the decree of the Master of the Rolls.

* *Mr. Kindersley*. — I only ask your Lordships to * 926 affirm a decree which was pronounced, — the Master of the Rolls' decree.

LORD CAMPBELL. — I should have been very much inclined to adhere to that, but it seems to proceed upon the principle, that if there be three objects, and one fails, then you are to substitute, as a matter of necessity, the other two.

THE LORD CHANCELLOR. — I cannot conceive that when one fails, therefore you are to distribute the fund among the other two; particularly if the one that fails had no resemblance to the other two.

LORD COTTENHAM. — The rule of the Court of Chancery throughout, as *Mr. Kindersley* well knows, is, that in matters of pure discretion the Court of Appeal is very unwilling to interfere; for instance, in the appointment of guardians or trustees, because it is merely the conjecture of one mind

as opposed to the conjecture of another; but if the Master has acted on a wrong principle in his appointment, then the Court is bound to interfere to establish a right principle; and so here, unless the Master of the Rolls proceeded on a right principle, the Lord Chancellor was bound to alter his decree.

LORD CAMPBELL. — The Master of the Rolls did not act upon his discretion: he would have pronounced a different decree, but he thought he was bound to attend to the two other objects of the charity, and that the fund was to be divided between them.

THE LORD CHANCELLOR. — I have thought from the outset that that decree means nothing more than this; that for the purpose of ascertaining what the testator's charitable intentions were, you must look at the whole will, that is, all the charitable bequests in the will. It does not at all lead
 * 927 to the conclusion that something * must be given to each of those existing charities, because one entirely unconnected with them, being for an object totally different, has failed. Let us see what the tendency of his charitable inclination was; how it manifested itself. When you find how it manifested itself in disposing of his property, dispose of the charity, the object of which has failed, in a way corresponding with that manifestation. It appears to me that the Master of the Rolls did consider himself fettered by the terms of the will, so that he was bound to give sums to each of these existing objects of the charity. From the very first, I never thought that that was the true view of the case. If I were to look about in every direction for the purpose of saying how this surplus property could best be applied, I could not apply it to any object better than charity schools within the limit stated in the Lord Chancellor's decree. Then, as I have said before, and as the noble and learned Lord in pronouncing that decree seems to have considered, — as this which has entirely failed was a charitable object more extensive in its range than the metropolis and its vicinity, it is reasonable also to extend the substituted charity, namely, the education of the poor. I have paid

great attention to what the learned counsel for the appellants have said, but there is nothing that occurs to me that can be done better than what has been done; therefore I am for affirming the decree.

LORD BROUGHAM. — I think the Master of the Rolls was right in this respect, that he thought, under the directions of the order of reference, "regard being had to the other charitable bequests in the will," he was not to leave them out of his view: but I think he has gone wrong in supposing that, because there were three objects impressed with charity, the fund for one which * has failed is impressed with a * 928 charity for the remaining objects: therefore I think, when Lord COTTENHAM reheard the case, he was bound to correct that view.

THE LORD CHANCELLOR. — It is not merely that by reversing the decree you are setting aside the exercise of one discretion and conjecture by the exercise of another conjecture and discretion, but you are to consider the interest of the charity itself, the enormous expense that is occasioned by these successive inquiries.

LORD BROUGHAM. — I think Lord LANGDALE did not exercise his discretion; if he had done so, I should not be inclined to substitute Lord COTTENHAM's for his; but he held that he was bound by that sort of opinion which had been expressed in the former decree (the decree of reference).

LORD CAMPBELL. — I am of opinion that this decree ought to be affirmed. I should have been better pleased if the scheme that is to be adopted had been nearer to the object that has failed; and if this were not a pure matter of discretion for a Court of Equity, I should propose that measures be taken for some other scheme; but as it is merely discretionary, I would not at all substitute my opinion on a point of discretion for that of another Judge. The three objects which the testator had in view are totally distinct in terms; and I think it would be erroneous to hold that, one of them

having failed, the fund that was to go to that one should be equally divided between the other two. That is the view on which the Master of the Rolls seems to have proceeded ; and one of the learned counsel for the appellants felt that he was bound to contend for that view, and he did boldly contend that if there were three objects, and one failed, the other two were to have the fund divided between them.

* 929 Now it appears that there is * no authority for any such rule, and I believe there is no principle in it, because the three may be totally distinct, and the testator may have assigned as much as he thought was sufficient for the two that exist, and we might be going entirely against his intention if we were to give to them what he intended for a totally different object. I should say, therefore, that you should find the *cy-près* to the one that has failed, without much consideration of the two others, that are entirely distinct ; but at the same time there could be nothing wrong in the former decree directing that the Master was to have regard to those two. He was to have regard to the whole will, because you will do the best you can to consider what the testator would have done if he had foreseen that state of circumstances which happened long after his will. If the Master of the Rolls had proceeded on a proper principle, and exercised his discretion, I should be very loath to interfere with the exercise of it, and should be inclined to return to what he had decreed ; but it is quite clear that he had not exercised his discretion. He thought he was fettered by a rule which does not exist, and which is not the doctrine of the Court. Well, then comes the decree of Lord Chancellor COTTENHAM, and he proceeded upon what I apprehend to be clearly a just principle. He says that the fund ought to be applied in the manner which his decree specifies. Now I think that that is, if *cy-près*, at an immense distance from the object that has failed ; but still I think it would be by no means for the benefit of the charity to reverse this decree. I am not prepared to substitute any thing for it, and I think it would lead to very inconvenient consequences if we were to direct any further inquiries. I think that the best thing we can do for the public and for the charity is to affirm

the decree; and it will always be * recollected that in * 980
doing so we violate no principle that has ever been laid
down, because the Court has proceeded *cy-près*, that is, has
come as near as the Judge thought he could to what was the
intention of the testator.

THE LORD CHANCELLOR. — *Mr. Kindersley*, we consider that
the Master of the Rolls was not bound by the terms of the
decree of reference; I do not think he should have con-
sidered he was so bound, the terms of the decree do not lead
at all to that conclusion; I think they amount to nothing
more than this, that you must look at the will to see what
were the charitable intentions of the testator.

Mr. Kindersley. — I feel very awkwardly situated; your
Lordships are giving judgment, and I was in the middle of
my observations, and had meant to draw your Lordships'
attention to one or two matters —

[Their Lordships severally expressed their readiness to
hear the learned counsel, desiring him to consider what passed
only as their impression at the time.]

Mr. Kindersley. — I would not be guilty of the indiscretion
of arguing what your Lordships have expressed an opinion
upon; but your Lordships have not addressed any observa-
tions to the question whether, if you are to exclude the
third object, the second object ought to be schools generally
throughout England and Wales, or ought not to be schools
in London and the suburbs. What struck me was, that,
assuming the third object to be out of consideration alto-
gether, then you have to consider what you may infer to
have been the inclination of the testator with reference to
the schools. They were to be schools in London and its
suburbs, and of the Church of England. How can the ex-
tension of such schools be *cy-près* to the redemption of
British slaves, without distinction of religion?

* THE LORD CHANCELLOR. — When the testator * 981
[781]

establishes schools, he takes care that they should be of the Church of England. When he means to rescue men from slavery, he does not measure his object by the Church of England.

Mr. Kindersley. — But does not that illustrate the observations that *Mr. Adams* made, that the object of that gift was not universality of redemption from slavery; it was redemption of British captives? The word “British” was not intended to be as extensive as England and Wales, but intended to include only those that might be caught on the coast of Barbary. If the testator had meant “slaves in Barbary or Turkey,” the consequence would be that Spanish and Italian slaves should be redeemed. He meant to limit the charity narrower than that, and his intention was so far from universality, that he did not mean a benefit even to the whole British public. Of all possible ways to work out the generally expressed intention in favour of the British people, he selects the mode in which the smallest conceivable number of them could ever derive a benefit from the gift.

THE LORD CHANCELLOR. — There was nothing local in the bequest that has failed. Why would you engraft locality on that which you substitute for it?

LORD BROUGHAM. — I understand *Mr. Kindersley's* argument to be this: “The object of charity which has failed was to redeem British slaves, without regard to whether they were Church of England men or dissenters. Now you limit this education, which you substitute, to the Church of England, excluding dissenters. You make what the testator prescribed respecting schools the guide, to a certain degree, of what you substitute for the object which has failed.

You substitute for that object schools in England
* 932 *and Wales; but you confine these schools to the Church of England people, because he has so directed in respect of the schools established expressly by his will. Well, then, why do you make the extension of that gift, which has not failed, universal? Why make it British,

instead of confining it to London? The object which has not failed is just as much a restriction to London as a restriction to the Church of England. Why, therefore, do you, in substituting schools for redemption of slaves, restrict the snbstitute to the Church of England, and not leave it as unrestricted as the testator left the redemption of slaves; unrestricted as to religion, but universal as to Britain?" That, I conceive, is *Mr. Kindersley's* argument.

LORD COTTENHAM. — Does *Mr. Kindersley* ask that we should strike out of the substituted object, the qualification "where the education is according to the Church of England"?

Mr. Kindersley. — No: for that would be a direct violation of the obvious intention of the testator.

THE LORD CHANCELLOR. — There was no locality in the charity that has failed. In substituting another object in lieu of that, why should we engraft locality on it?

Mr. Kindersley. — I answer, that there was no religious test, as to the charity that has failed. Why do you engraft a religious test on the substitute?

LORD COTTENHAM. — Because the founder has given us a precise and distinct rule; as much as to say, "I will have them instructed only according to the Church of England."

Mr. Kindersley. — And he says, "I will have them instructed only in London and its suburbs." He has given us that rule as much as the other. I hope your Lordships will not think I am obstinately arguing * against your * 933 Lordships' judgment. I feel that most of your Lordships' observations have been observations against me in this sense, that I should have been glad to have heard them from the other side, that I might treat them more roundly and with less tenderness than when they come from your Lordships. I did not know until Lord CAMPBELL began that you were pronouncing judgment.

THE LORD CHANCELLOR. — I am to blame. I am not sure that I did in the outset intend to give judgment. I had no right to pronounce judgment in the course of your argument; however, I have expressed my opinion, and I do not see any reason to depart from it. It is obvious that one of the testator's great objects was education. We substitute something in lieu of the object which has failed. There was no limit of that to place; therefore I do not see why we should limit the substitute to place, though we limit it to the Church of England, because it is clear he intended that education should be according to the principles of that church.

LORD BROUGHAM. — It is clear that he meant the education to be given should be according to the Church of England; it is not at all clear that, if education was to be given with the surplus fund, he would have it confined to London.

Mr. Kindersley. — Your Lordships will probably think that, as there were contrary decisions, this is not a case for costs.

LORD BROUGHAM. — The appellants must pay the costs of the appeal; they have funds enough.

The appeal was dismissed and the decree complained of affirmed, with costs.

* RAILTON v. MATHEWS.

* 934

1844.

EDWARD RAILTON *Appellant.*
 THOMAS GADD MATHEWS and ROBERT LEON- }
 ARD and Another } *Respondents.*

Surety. Undue Concealment. Direction to a Jury.

A party became surety in a bond for the fidelity of a commission agent to his employers. After some time the employers discovered irregularities in the agent's accounts, and put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment by the employers of material circumstances affecting the agent's credit prior to the date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding Judge directed the jury, that the concealment, to be undue, must be wilful and intentional, with a view to the advantages the employers were thereby to gain.

Held by the Lords (reversing the judgment of the Court of Session), that the direction was wrong in point of law.

Mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself.¹

¹ See *Owen v. Homan*, 3 Mac. & G. 878; s. c. 15 Jur. 339; s. c. 4 H. L. Cas. 997; 1 Story Eq. Jur. §§ 214, 215, 324, 383; *Etting v. Bank of United States*, 11 Wheat. 59; *Hamilton v. Watson*, 12 Cl. & Fin. 109; *North British Ins. Co. v. Lloyd*, 10 Exch. 523; *Stewart v. M'Kean*, 10 Exch. 675; s. c. 1 Jur. n. s. 45; *Chase v. Brooks*, 5 Cush. 43; *Franklin Bank v. Cooper*, 36 Maine, 179; s. c. 39 Maine, 542; *Walker v. Hardman*, 4 Cl. & Fin. 258; *Willis v. Willis*, 17 Sim. 218; *Allan v. Houlden*, 6 Beav. 148; *Squire v. Whitton*, 1 H. L. Cas. 333; *Richmond v. Standclift*, 14 Vt. 258; *Samuel v. Withers*, 16 Missou. 532; *Graves v. Tucker*, 10 Sm. & M. 9; *Rees v. Berrington*, 2 Lead. Cas. in Eq. (3d Am. ed.) 529, [814] *et seq.*; *Evans v. Kneeland*, 9 Ala. 42; 2 Am. Lead. Cas. (3d ed.) 341; *Bonar v. Macdonald*, 3 H. L. Cas. 226. The teller of a bank was a

June 14, 1844.

THE respondents, Mathews and Leonard, carried on business in partnership at Bristol: their business extended to Scotland, and was conducted by their agents in Glasgow Messrs. Rowley and Hickes acted as such agents from January, 1832, to February, 1834, when they dissolved partnership, and it became necessary for the respondents to make a new appointment of agency. Hickes and Rowley then severally applied for the appointment. The respondents gave it to Hickes. The appointment was by letter, dated Bristol, 25 January, 1834, in these terms: "Sir, — We appoint you as our agent for the sale of dye wares, and to collect all our moneys; you finding us security for 3000*l.*, as proposed."

* 935 * Hickes, upon being so appointed, entered upon the agency, or rather continued the agency held before by him and Rowley. Being afterwards required by the respondents to find the security, he proposed his brother, who resided in England, and the appellant, who was a writer in

defaulter to it at the time sureties entered into a new bond for the faithful performance of his duties &c.; it was held, that if the bank fraudulently concealed that he was then a defaulter, the sureties would not be liable for a subsequent default. But if the bank had no reason to suspect the teller, and there was no request by the surety to investigate his accounts, an omission by the bank to make such investigation would not discharge the surety. *Wayne v. Commercial National Bank*, 52 Penn. St. 343; see *Hamilton v. Watson*, 12 Cl. & Fin. 109. If the surety requires to know any particular matter, of which the party about to receive the security is informed, he should make it the subject of a distinct inquiry. *Hamilton v. Watson*, 12 Cl. & Fin. 109. As to the effect of negligence on the part of the party taking the security in not knowing existing circumstances material for the surety to be informed of, see *Wayne v. Commercial National Bank*, 52 Penn. St. 343, 349, 350, where it is said that the ground of complaint was "negligence on the part of the officers of the bank in not knowing the true state of the teller's accounts with the bank at the time of his appointment, or rather when the security was given by him." It seems now to be settled that there must be something amounting to fraud to enable a surety to claim to be released from his contract on account of misrepresentation or concealment. *Pledge v. Buss*, Johns. 663; 6 Jur. N. S. 695; *North British Ins. Co. v. Lloyd*, 10 Exch. 523; s. c. 1 Jur. N. S. 45; *Atlas Bank v. Brownell*, 9 R. I. 168.

Glasgow. The respondents agreed to accept the proposed sureties without any communication with either of them ; and the necessary bond having been prepared and transmitted to the agent, was subscribed by him and by the appellant at Glasgow in September, and by the other surety in October, 1835. The bond was in the English form, and in the penal sum of 4000*l.*, conditioned that the agent should faithfully conduct himself as the clerk and commission agent of the respondents, and satisfactorily account to them for all moneys received on their account.

In May, 1837, the respondents discovered that Hickes had acted unfaithfully in the agency, and had contrived to apply their moneys to his own use to a large amount. They gave notice of this discovery to the sureties ; and subsequently, by the third respondent, their mandatary in Scotland, raised an action against all the obligors in the bond, concluding for count and reckoning of the whole of the agent's actings, and for payment of the 4000*l.*, or such part thereof as might be found to be due by the agent.

The appellant alone defended the action ; but before any final judgment was pronounced, he raised an action against the respondents for reduction of the bond, upon various grounds, principally on this : " that the bond was obtained fraudulently by the respondents, and on the procurement thereof they were guilty of a fraudulent concealment of material circumstances known to them, and deeply affecting * the credit and trustworthiness of the said * 936 Hickes." The libel then, after stating various circumstances importing the respondents' knowledge of Hickes' misconduct and irregularities in the agency during the period of his partnership with Rowley, summed up the whole statement to this effect : That although at and prior to the time of receiving the bond, the respondents had been made acquainted with the misconduct of Hickes in misapplying the funds of the firm of Rowley & Hickes to his own private purposes ; and although, from their own experience of his gross irregularities under the agency, they were perfectly aware that he was unworthy of trust, they totally failed to communicate (to the sureties) the said circumstances or

either of them, or the existence of any balance on the agency accounts then standing against Hickes; on the contrary, while they accepted and took possession of the bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of Hickes, and the state of his accounts, which circumstances were wholly unknown to the appellant, and the respondents, by their whole conduct in the premises, deceived and misled the appellant into the belief that Hickes was in every respect trustworthy, while they well knew the reverse; whereby the bond was obtained by them through fraud and deceit, and the undue concealment of material facts, which they knew, if communicated, would have prevented the appellant from undertaking the said obligation or subscribing the bond; or the respondents were guilty of fraudulent concealment of material circumstances in obtaining the bond, and the same was therefore null and void.

* 937 The two actions are afterwards conjoined, and * issues were directed: the first issue, which was in the appellant's action and was first tried, being, "Whether the pursuer, E. Railton, was induced to subscribe the bond by undue concealment or deception on the part of the defenders, or either of them?"

The Lord Justice Clerk, who presided at the trial, in the course of his charge to the jury, directed them that under this issue, "the concealment must be, first, of things known to the defenders, or which they had strong and grave ground to suspect; secondly, that the concealment therefore being undue, must be wilful and intentional, with a view to the advantage they were thereby to receive."

The jury found a verdict in favour of the respondents, and, in effect, sustained the bond; whereupon the appellant's counsel took an exception to the learned Judge's direction to the jury.

The bill of exceptions was argued before the Lords of the second division, who, by the interlocutor of the 31st of January, 1844, disallowed the same, (a) and refused to grant a

(a) 6 Bell, Murray, Young & Tennant, pp. 540-565; s. c. 16 Dunbar, Beveridge & Fordyce, 252.

new trial, and appointed judgment to be entered up on the verdict.

The appeal was against that interlocutor.

Mr. Serjeant Talfourd and *Mr. Fleming*, for the appellant, after stating the evidence as set forth in the bill of exceptions, said it showed clearly that the respondents, before they took the bond of caution, were well aware of the agent's misconduct in the agency while he was in partnership with Rowley, but they did not disclose the facts to the proposed sureties. The respondents also knew that after Hickes * became sole agent to them he was irregular in his * 938 accounts, and they frequently remonstrated with him by letter, but did not make any communication of those irregularities to the sureties, who had no reason to suppose that the agent was not perfectly trustworthy. The respondents' concealment or non-communication of those irregularities, whether they were influenced by any advantage to themselves or not, was an undue concealment, and relieved the sureties from their obligation; and, therefore, the learned Judge's charge to the jury was wrong in law. *Montague v. Tidcombe*, (a) *Shepherd v. Beecher*, (b) *Rees v. Berrington*, (c) *Smith v. The Bank of Scotland*, (d) *Duncan v. Porterfield*, (e) *Muir v. Hardie*, (g) *Dalzell v. Menzies*, (h) *Thompson v. The Bank of Scotland*. (i) Assimilating suretyship to policies of insurance, as to the necessity of disclosing all material circumstances to the underwriter, they referred to *Carter v. Boehm*, (k) and to the first volume of Park on Insurance, p. 408 *et seq.*

Mr. F. Kelly and *Mr. Anderson*, for the respondents, submitted, that as the respondents did not believe that the charge made by Rowley against Hickes affected his trustworthiness,

(a) 2 Vern. 518.

(b) 2 P. Wms. 288.

(c) 2 Ves. Jr. 540.

(d) 1 Dow, 272; s. c. 7 Sh. & Dunl. 244.

(e) 5 Sh. & D. 111.

(g) 8 Sh. & D. 346.

(h) 9 Sh. & D. 484.

(i) 2 Shaw's App. Cas. 316.

(k) 3 Burr. 1905.

it was not material to communicate it to the sureties. They denied that there was any similarity between this case and cases of insurance. They relied upon the able exposition of the law on the subject, as given in the judicial speeches * 939 in the Court below, (a) and also on * the observations of Lord BROUGHAM, in *M Taggart v. Watson*, (b) in this House.

LORD COTTENHAM. — Entertaining an opinion against the judgment pronounced in the Court below, if I had felt any doubt upon the subject, or had considered it a case which required more investigation of the facts than it has received, I certainly should have been unwilling to dispose of it without taking time for further consideration; but the facts are so simple, and the points are so free from doubt, that I see no reason why the House should not at once dispose of the case.

The real question is, whether the way in which the learned Judge put this case to the jury, and described to them the duty they had to perform, was or was not consistent with and properly applicable to the issue raised for their consideration. The issue, in my opinion, very clearly describes the point which the Court wished to have investigated. The terms of the issue must, of course, be construed as they stand; but it is not immaterial to look to the points raised in the pleadings, for the purpose of construction. If there were any doubt upon the meaning of the terms used, I would look to the summons for reduction of the instrument of suretyship; and I find several facts appearing, as having passed between the party who was the subject of the suretyship and those by whom he had been previously employed; and I find the matter stated in these terms: “That the parties totally failed to communicate the said circumstances, or either of them, or the existence of any balance on the agency accounts then * 940 standing against the said * George Hickes, to the pursuer or to the said Henry Williams Hickes; and on the

(a) 6 Bell, M., Y. & T. 540; s. c. 16 D., B. & F. 252.

(b) 3 Cl. & Fin. 536; s. c. 1 Sh. & Maclean, 553.

contrary, while they accepted and took possession of the said bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of the said George Hickes," &c.

There is an imputation made of direct fraud, a fraudulent intention influencing the acts of the parties, and there is a direct statement of such concealment.

It has not been contended, and it is impossible to contend, after what Lord ELDON lays down in the case of *Smith v. The Bank of Scotland*, (a) that a case may not exist in which a mere non-communication would invalidate a bond of suretyship. Lord ELDON states various cases in which a party about to become surety would have a right to have communicated to him circumstances within the knowledge of the party acquiring the bond; and he states that it is the duty of the party acquiring the bond to communicate those circumstances, and that the non-communication, or, as he uses the expression, the concealment of those facts would invalidate the obligation and release the surety from the obligation into which he had entered.

Now, when the issue in this case was tried, such being the points raised between the parties, we have nothing to do with the evidence in the cause, or the facts proved, or the conclusion to which the jury might or might not have come under the circumstances, but with the question whether the charge which was made to them was such a charge as we conceive ought to have been made to them. The issue for their consideration was, as a matter of fact, * "whether the * 941 pursuer, Edward Railton, was induced to subscribe the bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them;" raising these two propositions which were raised in the pleadings in the cause, either of which, if found in the affirmative, would lead to the conclusion of the cause.

The question — looking at the terms in which the matter was left to the jury, and the mode in which the learned Judge informed the jury they ought to perform their duty — is

(a) 1 Dow, 272 ; see p. 292 *et seq.* ; s. c. 7 Shaw, 244, 248.

whether there may not have been a case brought before the jury for their consideration of improper and undue concealment (which I understand to mean a non-communication of facts which ought to have been communicated), which would lead to the relief of the surety, although the non-communication might not be wilful and intentional, and with a view to the advantage which the party was thereby to receive. That which I find here extracted from the charge of the learned Judge, I understand to be one proposition. The learned Judge lays it down distinctly that the concealment, to be undue, must be wilful and intentional, with a view to the advantage they were thereby to receive. In my opinion there may be a case of improper concealment or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive. The charge, therefore, I conceive, was not consistent with the rule of law; I think that it narrowed the question for the consideration of the jury beyond the limits which the rights of the parties required to have submitted to the consideration of the jury.

* 942 * Without going further into the law which regulates the rights of these parties than that which was stated by Lord ELDON in *Smith v. The Bank of Scotland*, we find that in a judgment of this House in the case of an appeal from Scotland, and therefore one peculiarly valuable in the case now under consideration, that has been declared to be the law. The terms used by the learned Judge in directing the jury having limited the question for their consideration much more than the rule of law would justify, it appears to be quite clear that this case has not been properly tried, that the exceptions were properly taken, and that this House is bound to pronounce such a judgment as ought to have been pronounced by the Court of Session.

LORD CAMPBELL. — This case has been very satisfactorily argued on both sides; with great brevity, but every thing has been argued which could be for the advantage of the clients or the assistance of your Lordships; and having listened to

all which has been urged on both sides very attentively, I, without the smallest hesitation, come to the conclusion that the bill of exceptions ought to be allowed, and that there must be a new trial.

The question really is, What is the issue which the Court directed in this case? "Whether the pursuer, Edward Railton, was induced to subscribe the said bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them?" The material words are, "undue concealment on the part of the defenders." What is the meaning of those words? I apprehend the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted * to * 943 divulge facts within their knowledge which they were bound in point of law to divulge. If there were facts within their knowledge which they were bound in point of law to divulge, and which they did not divulge, the surety is not bound by the bond: there are plenty of decisions to that effect, both in the law of Scotland and the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another, I apprehend is wholly immaterial. It certainly is wholly immaterial to the interest of the surety, because to say that his obligations shall depend upon that which was passing in the mind of the party requiring the bond appears to me preposterous; for that would make the obligation of the surety depend on whether the other party had a good memory, or whether he was a person of good sense, or whether he had the motive in his mind, or whether he was aware that those facts ought to be disclosed. The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not upon what was passing in the mind of the other party, or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the

motive for withholding them, I apprehend, is wholly immaterial.

Then we come to the direction given by the learned Judge.

He says, "The concealment, therefore, being undue,
 * 944 must be wilful and intentional, with a view " * (and
 that is with reference to the motive) "to the advantage
 they were thereby to receive." Now, according to my notion
 of the issue, that is an entire misconception of it: according
 to this direction, although the parties acquiring the bond had
 been aware of the most material facts which it was their duty
 to disclose, and the withholding of which would avoid the
 bond, if they did not wilfully and intentionally withhold
 them, that is to say, if they had forgotten them, or if they
 thought by mistake that in point of law or morality they were
 not bound to disclose them, then, according to the holding of
 the learned Judge, it would not be a concealment. But the
 learned Judge does not stop there; he goes on, "with a view
 to the advantage they were thereby to receive;" introducing
 those words conjunctively, and, in effect, saying that it was
 not an undue concealment unless they had their own particu-
 lar advantage in view. That appears to me a misconception.
 I will suppose that their motive was kindness to Hickes; to
 keep back from those who, it was material to him, should con-
 tinue to have a good opinion of him, the knowledge of those
 facts; that it was a pure kindness on their part, to prevent
 those parties entertaining a bad opinion of him, and not from
 any selfishness, this concealment took place. Although that
 might be the motive, yet the fact that he was in arrear and
 had been guilty of fraudulent conduct, and that he was a
 defaulter, were facts which it was most material for the
 surety to be acquainted with. If those were held back
 merely from a kind motive to Hickes, and not at all from
 any selfish motive on the part of those to whom the bond was
 to be executed, the effect in point of law would be the same
 as if the motive were merely the personal benefit of the
 * 945 parties to receive the bond. It appears * to me, there-
 fore, that the learned Judge has misunderstood the
 meaning of the issue, and that having told the jury that a
 concealment to be undue must be wilful and intentional with

a view to the advantage which the parties were thereby to receive, that was a misdirection, and that it had a tendency to mislead the jury; that it was wrong in point of law, and that the exception to that direction ought to be allowed.

Interlocutor complained of reversed; bill of exceptions allowed; and a new trial directed.

1842.

THE FITZWALTER PEERAGE.

Barony by Writ. Abeyance. Former Claim. Evidence.

An ancient barony in fee, after having been enjoyed by the lineal heirs of the first baron successively for centuries, then becoming dormant for some time, was claimed and again enjoyed by one who, after full investigation, was found to be the heir of the first and last barons; it afterwards fell into and remained in abeyance among his coheirs for more than eighty years.

Semble, that it is not necessary for one of these coheirs claiming the barony to give proofs of the first creation, and of the divers mesne descents of it. (*Infra*, p. 956.)

Semble, that on a claim to an ancient barony, minutes of proceedings on a former claim, before the King in Council, are admissible in evidence in the House of Lords. (*Infra*, p. 952.)

A long abeyance of a barony in fee, if satisfactorily explained, is no objection to a claim. (*Infra*, p. 957.)

A copy of a will produced from the Prerogative Office was received, after proof of unsuccessful searches for the original, and that the practice in the office at the time of the date of the will was to give out the original wills after taking copies. (*Infra*, p. 952.)

An old attested copy of a deed of settlement, produced from the proper custody, was received, after proof of unsuccessful searches for the original, and that the possession of the estates comprised in the settlement went with it. (*Infra*, p. 953.)

June 28; July 21, 1842. May 9; June 22, 1843. March 18; July 18, 1844.

ROBERT FITZWALTER (grandson and heir of Robert Fitzwalter, chief of the confederated barons who obtained Magna Charta from King John) was summoned to Parliament as a baron of the realm, by writ tested the 23d day of June, 23 Edw. 1 (1293). He was summoned to other Parliaments in the reigns of Edw. 1 and Edw. 2; and having sat in Parliament pursuant to such writs, he acquired a barony to him and the heirs of his body. (a) He died in 1325, and * 947 was succeeded in the dignity by his son and heir, * from whom it descended to his lineal heirs male through five generations, till Humphrey Fitzwalter, the sixth baron, died without issue in 1409, when the barony devolved on his brother Walter, who was accordingly summoned to and sat in Parliament in the 7th & 9th of Hen. 6. Walter, the seventh baron, died in 1432, leaving a daughter his sole heir, married to Sir John Ratcliffe. Her son and heir, John Ratcliffe, was summoned to and sat in the Parliaments of Hen. 7 as Baron Fitzwalter, and his descendants of the family of Ratcliffe successively enjoyed the dignity down to the year 1629, when Robert Ratcliffe, the 13th baron, died without issue. The title then remained for some time dormant. It was claimed in 1641 by Sir Henry Mildmay, and in 1660 by Henry Mildmay, the former being the son, and the latter the great-grandson and heir of Lady Frances Ratcliffe, by her husband, Sir Thomas Mildmay, of Moulsham, in the county of Essex. (b) Lady Frances was the only daughter of Henry Ratcliffe, 10th Baron Fitzwalter; and through her, her said son and grandson claimed, each successively, to be sole heir of the first Lord Fitzwalter, and the latter was occasionally styled Lord Fitzwalter. Upon his death, without issue, in 1661, while his claim was pending, his brother and heir, Benjamin Mildmay, took up the claim, and after a long opposition from Robert Cheeke, Esq., a counter-claimant, he finally established his right to the barony before the King in Council, in January, 1669, and he was accordingly summoned

(a) See the Hastings Peerage, *ante*, Vol. VIII., pp. 144, 157, n.

(b) See Lords' Jour. for 9th August, 1641; 20th and 27th of August, and 5th of September, 1660.

to Parliament as Lord Fitzwalter, by a writ tested the 10th of February of that year (22 Chas. 2). He consented (to avoid a controversy with other peers, but with a *salvo jure*) to * take his seat in the House of Lords as the * 948 last baron of the reign of King Edw. 1. (a) He died in 1679, and was succeeded by his eldest son, Charles, the 16th baron, who died in 1727, without leaving issue, and was succeeded by his brother and heir, Benjamin, the 17th baron; upon whose death, in 1756, without surviving issue, the barony fell into, and has remained since in abeyance among the coheirs of his then deceased aunt, Mary Mildmay, wife of Henry Mildmay, of Graces, in the county of Essex, and only sister of Benjamin, the 15th Lord Fitzwalter, who, as before mentioned, established his right to the dignity in 1669.

In the year 1835, Sir Brook William Bridges, of Goodnestone, in the county of Kent, and of Graces aforesaid, Bart., presented his petition (b) to the King, stating the creation, descent, and abeyance of the barony, and his own claim thereto as one of the coheirs of the said Mary Mildmay, and praying his Majesty to determine the abeyance in his favour, and direct a writ of summons to Parliament to be issued to him as Baron Fitzwalter. The King referred that petition, with the Attorney-General's report thereon, (c) to the House of Lords, who referred the same to the Lords Committees for Privileges. The petitioner did not then proceed further in the prosecution of his claim; but in May, 1842, he laid on the table of the House his printed case, and a summary statement of * the proofs in support of it, com- * 949 mencing with an extract from the books of the Privy Council, of the decision in favour of Benjamin Mildmay,

(a) See Lords' Jour. for 20th February and 5th March, 1667; for the 1st, 7th, 14th, 15th, 21st, 27th, and 29th of April, 1668; for the 14th and 28th of February, the 7th, 8th, and 24th of March, 1669; and the 27th of October, 4th and 10th of November, 1670. See also Collins's Baro. by Writ, 268 *et seq.*; 3 Dudg. Bar. p. 288; Cru. on Dignities, and the Lords' First Rep. on the Dign. of a Peer, pp. 445, 446, and p. 486, n. 82, and Appendix iv. to that report.

(b) 67 Lords' Jour. p. 144.

(c) *Vide infra*, p. 952.

in 1669; the petitioner being then under the impression that the House would not require proofs of the creation or mesne descents of the barony.

The case stated the pedigree of the petitioner and of the other coheirs of the said Mary Mildmay, to this effect: That she married Henry Mildmay of Graces aforesaid, and died in 1715, having had issue by him several children, some of whom died young and unmarried, and five lived to be married; namely, Mary, the eldest, to Charles Goodwin; Lucy, the second, to Thomas Gardiner; Elizabeth, the third, to Edmund Waterson; Frances, the fourth, to Christopher Fowler; and Catherine, the fifth, to Thomas Townshend: that of these five coheiresses of Mary Mildmay, two (Mrs. Goodwin and Mrs. Waterson) died without issue, the former in 1724, the latter in 1746: that Mrs. Townshend died in 1708, having had issue two sons, both of whom died unmarried: that Mrs. Fowler, who died in 1705, had four sons, besides daughters; and Mrs. Gardiner, who died in 1742, had three sons and three daughters: that Mrs. Fowler's first and second sons died unmarried; and the third, Edmund (*a*) (who in these events became the heir of his mother), married a Miss Pateshall in 1744, succeeded to his grandfather's estate of Graces in 1746, as devisee under the will of his maternal aunt, Mrs. Waterson, and died in 1751, leaving Fanny Fowler, his only surviving child and sole heir (two other children died * 950 * in infancy): that she, Fanny Fowler, on the death of the last Lord Fitzwalter, in 1756, became one of the coheirs of that barony; in 1765 she married Sir Brook Bridges, of Goodnestone aforesaid, Bart.; and having survived him, died in 1825, leaving Sir Brook William Bridges her son and heir, who married a Miss Foote in 1800, and died in 1829, leaving, besides other issue of his said marriage, this petitioner, his eldest son and heir, who, therefore, is one of the coheirs, if not sole heir, of the said barony.

The case then went on to trace the issue of Mrs. Gardiner;

(*a*) It was not proved that Mrs. Fowler had any son but Edmund. A pedigree found among his papers was the only evidence of the existence of these two, and the same pedigree extinguished them. See, as to this pedigree, *ante*, p. 193 *et seq.*

and after stating that her three sons and one of her daughters died unmarried, stated that her eldest daughter, Lucy, married Sir Richard Bacon in 1728, became in 1756 one of the coheirs of the barony, and died in 1765 without surviving issue: that Mrs. Gardiner's second daughter, Jemima, married John Joseph, a surgeon, by whom she had an only child, Jemima, who married Robert Duke, a draper, of Colchester, became one of the coheirs of the said barony in 1756 (her mother being then dead), and died in 1761, leaving two sons and a daughter surviving; that these children, at least two of them, went with their father to America, but the petitioner was not able, after much inquiry, to discover what became of any of them, or whether they or any of their issue were living.

The petitioner added to his case an extract from the report of the Attorney-General (Sir F. Pollock) on his petition, concluding thus: "That on the death of Dame Lucy Bacon, in 1765, without surviving issue, the barony appeared to him to be in abeyance between the representatives (if any such existed) of the said Jemima Duke and the petitioner; but that if all issue from the said Jemima Duke should have been * extinguished, the right to the barony * 951 would devolve solely to the petitioner." However, on account of the importance of the matter, he (the Attorney-General) recommended to his Majesty to refer it to the House of Lords.

After this case had been presented, and the proofs therein referred to taken by the committee, the claimant was advised, *ex majori cautela*, to give proofs of the creation of the dignity, and the divers descents thereof through the families of Fitzwalter and Ratcliffe, down to the revival of it in Benjamin Mildmay in 1669. He accordingly petitioned the House, and obtained leave to present a statement of such supplemental proofs, which was accordingly laid on the table.

The committee of privileges met several days in the sessions of 1842, 1843, and 1844, to take the proofs, *Mr. Loftus Wigram* and *Sir Harris Nicolas* attending as counsel for the claimant, and the *Attorney-General* for the Crown. The fol-

lowing points, among others, (*a*) arose on the admissibility of evidence : —

It was proposed to put in the proceedings before the Privy Council, and the decision there in the year 1669, on the claim of Benjamin Mildmay.

The lords of the committee asked whether there was any precedent for receiving proceedings before the Privy Council on claims before this House, as proceedings before former committees of privileges.

The claimant's counsel said they were not aware of any precedent, (*b*) but the House had acted on these proceedings; effect having been given to them in assigning prece-
 * 952 dence to Lord Fitzwalter, on his taking * his seat in 1669. (*c*) They also referred to the third report of the lords committees on the dignity of the peerage, and to appendix iv. to the first general report, where these proceedings are printed.

A minute of the proceedings, dated the 19th of January, 1669, was then received, *de bene esse*.

Some copies of ancient instruments in the Rolls Chapel were produced, under the seal of the Record Office, and received in evidence (according to the Act 1 & 2 Vict. c. 94, §§ 11, 12, & 13) without further proof.

A deputy-keeper of records in the Prerogative-Office produced a copy, instead of an original will, dated 1646; and being asked why he did not bring the original, explained that for some centuries prior to the year 1700 the original wills were generally given out to the executors, after being registered in the books and copies taken, and those copies were preserved in bundles in the office, to stand as originals. The receipts given by the executors for the originals were filed in like manner. He had the receipt for the original will in this case. About the year 1700 the practice was altered; the original wills being since kept, and copies given out.

(*a*) *Vide ante*, p. 193.

(*b*) See the Roscommon Peerage, *ante*, Vol. VI., pp. 103, 129; the Braye Peerage, same volume, p. 767, and the Beaumont Peerage, p. 879.

(*c*) See Lords' Jour. for 14th Feb. and 10th Nov., 1669.

The lords of the committee asked for any instance of a copy of a will being received in evidence.

The claimant's counsel referred to the proceedings in the Braye Peerage. (a)

The copy was then received.

A copy of a deed of settlement made on the marriage of Charles Lord Fitzwalter, and dated the 25th * of May, 1693, was proposed to be put in evidence. * 953 The solicitor of the Mildmay family, who produced it from their muniments of titles, said, that family is in possession of the estates comprised in the deed: he searched in vain among their title-deeds for the original of this, but did not inquire for it of the trustees named in it, or of their descendants. The copy had this indorsement: "February 27th, 1727. This is a true copy, carefully examined with the original settlement, by us; PENISTON LAMB, SAM. HARPER."

The copy was then admitted, as an old attested copy coming out of the proper custody, subject, however, to objection afterwards, as to its admissibility, with direction also to the witness to make further searches for the original.

Proofs were on a subsequent day given of further searches for the original deed, and also for the original will, dated 1646, of which a copy had been received. These searches having proved unsuccessful, several other instruments were put in evidence confirmatory of both copies; and the claimant's counsel urged, as to the copy of the deed, that inasmuch as it was produced from the proper custody, and it was shown by other deeds that possession had gone along with it for many years, there could not be any valid objection to its admissibility in evidence. Buller's N. P. 361.

The Attorney-General admitted that it was the practice at Nisi Prius to receive copies of deeds under these circumstances, if brought from the proper custody.

No question arose on the admission of the numerous instruments referred to in the supplementary paper laid before the House by the claimant. They consisted of writs of summons, extracts from Parliament * rolls, *post-mortem* * 954

(a) 6 Cl. & Fin. 767; and see *Netterville Peerage*, 2 Dow & C. 342.

inquisitions, and other documents, the same which had been received in 1668 and 1669, on the claim of Benjamin Mildmay.

Mr. Wigram, having summed up the evidence on behalf of the claimant, observed, in conclusion, that the only difficulty in the deduction of the title to his client was, the unascertained fate of the issue of Jemima, the second daughter of Mrs. Gardiner (Lucy Mildmay). (*a*) The evidence extinguished the issue of the other coheirs; and, therefore, taken thus far, it would leave the title of Fitzwalter in abeyance between the present claimant and that Jemima's issue. She married a person of inferior rank to herself, John Joseph, of Kelvedon, in Essex, as shown by the family pedigree, and by the pedigree notes in the handwriting of Edmund Fowler, (*b*) which state that she had a child, named Jemima. We have made every inquiry to find what became of that child, and the result of those inquiries is that she married a person of the name of Robert Duke; and we have called a witness, who, having had occasion to obtain an assignment of an old outstanding term, made inquiry for that purpose respecting this family, and he was informed that Robert Duke had emigrated to America. We have, then, proved that through paid agents we have made inquiries in America and the colonies, and everywhere else that we could, to trace this Jemima's descendants; we have advertised also, but we can learn nothing at all of them. Therefore I feel that we are not in a position to say that we have completely proved the failure of her issue. The way in which I should put the case to your

Lordships is, as the result of the evidence shows, that

* 955 the title * has either devolved upon the claimant, if

this Jemima has died without issue, or, if there be any descendants of Jemima, then that the title is in abeyance between the claimant and such descendants. The report which I should ask of your Lordships is, that the barony fell into abeyance in the year 1756, between this claimant's grandmother Fanny Bridges, Dame Lucy Bacon, and Jemima Duke, as the coheirs of Mary Mildmay; that Dame

(*a*) *Vide supra*, pp. 949, 950.

(*b*) *Vide ante*, p. 193.

Lucy Bacon afterwards died without issue, and that no descendant of Jemima can now be found; that the barony has therefore either devolved absolutely upon the claimant, or, if there be in existence any undiscovered descendants of Jemima Duke, then that it is in abeyance between the claimant and them.

The Solicitor-General (Sir F. THESIGER). — This is the first occasion upon which I have had the honour to attend your Lordships in this case. I have very carefully looked over the evidence in proof of the pedigree, and it appears to me to be entirely satisfactory. I am told, also, that the present Lord Chief Baron (Sir F. POLLOCK), who has watched the whole of these proceedings before your Lordships when he was Attorney-General, is satisfied that the pedigree is proved.

It was necessary for the claimant to make out, in the first place, that this was a barony in fee, and I think that is established from the proof which has been given that upon two occasions the title devolved upon parties through females. The first instance was through Elizabeth, the only child of the seventh Lord Fitzwalter, by whom it came to the Ratcliffes, and afterwards to the Mildmays through Lady Frances Ratcliffe. Therefore I apprehend there is * no doubt * 956 whatever that it is a barony of the description contended for by the claimant. I think that is also proved by the proceedings in your Lordships' House upon the claim of Benjamin Mildmay in 1667, 1668, and 1669. Indeed I think the claimant might have almost commenced his evidence from those proceedings; but he has gone further, and proved the creation of the title in the reign of Edw. 1, and he has, I think, deduced it clearly down to Benjamin Mildmay, who established the claim in 1669. There is no doubt whatever that that claim was in respect of the title which was created in the reign of Edw. 1, for that is proved by the subsequent proceedings in this case, which ultimately resolved themselves into this, that he consented to take his seat in your Lordships' House as the junior baron of the reign of Edw. 1. I apprehend, therefore, that up to that point there is no difficulty whatever.

The title fell into abeyance in the year 1756, upon the death of Benjamin Mildmay, among the coheirs of Mary Mildmay, who was the sister of that Benjamin Mildmay who succeeded in establishing his title in 1669. I do not think the claimant has given very satisfactory evidence to account for the long abeyance, such as your Lordships generally require. The title fell into abeyance eighty-eight years ago, and there is no account given why it was permitted to remain so long dormant. That is an observation which I feel it my duty to throw out for your Lordships' consideration.

The only other part to which I would draw your Lordships' attention is the evidence with regard to the branch of the Gardiners. Your Lordships observe that Lucy Mildmay, Mrs.

Gardiner, is the eldest sister of the claimant's ancestor,
* 957 Frances Mildmay, * Mrs. Fowler. It is important that

he should satisfactorily account for that branch: I will not trespass upon your Lordships' time by adverting to the evidence on that subject. It will be for your Lordships to say whether it is satisfactory; whether the parties have used due diligence, and have resorted to the proper means for the purpose of discovering evidence for the extinction of that, the Gardiners', branch of the family. I do not mean to say that they have not done so: I merely throw it out for your Lordships' consideration whether it is satisfactory. It is difficult, perhaps, to trace a family which has fallen into decay, and appears to have emigrated; but still the result would be that the claimant, if that branch is extinct, would be the sole heir; if not, a coheir.

THE LORD CHANCELLOR.—I think the descendants of Jemima and Robert Duke are not sufficiently accounted for.

Mr. Wigram.—We do not conclusively prove their extinction.

THE LORD CHANCELLOR.—The probability is that some are in existence; whether they can be found or not, is another question. What do you say as to the observation made by the Solicitor-General, that you have not sufficiently accounted

for the time that has elapsed since the barony first fell into abeyance ?

Mr. Wigram. — I do not apprehend that that ought to be an objection: the barony fell into abeyance in 1756. There are cases in which claims have been sustained after an abeyance of upwards of 100 years. (a) It * may have * 958 been that none of the persons entitled at any time since 1756 to this barony was in possession of means which would make him aspire to a seat in your Lordships' House. I may add, that the grandmother of the claimant, Dame Fanny Bridges, lived till 1825, so that there has been scarcely any default in making the claim; for a female would not be so anxious for the dignity as a male heir.

THE LORD CHANCELLOR. — Then you claim as one of the coheirs. What are the terms of your claim ?

Mr. Wigram. — That the barony fell into abeyance upon the death of Benjamin Mildmay in 1756, between Dame Fanny Bridges, Dame Lucy Bacon, and Mrs. Jemima Duke, as the then coheirs of Mary Mildmay. We have shown that Dame Lucy Bacon died without issue; so that, assuming that Jemima Duke had issue, we say the barony is now in abeyance between the claimant and her descendants, if any there be.

THE LORD CHANCELLOR. — I think that case is made out satisfactorily. It appears to me, my Lords, that the claimant has satisfactorily shown that the barony is in abeyance between himself and the descendants, if any, of Jemima Duke: therefore, that his claim is established only so far as his being one of the coheirs.

(a) The barony of Vaux of Harrowden was in abeyance from 1663 to 1838: *vide ante*, Vol. V., p. 526; the Braye barony, from 1557 to 1839; the Camoys, from 1427 to 1840; the Beaumont, from 1509 to 1840: *vide ante*, Vol. VI., pp. 757, 789, and 868: and the Hastings barony was in abeyance from 1540, if not from 1389, to 1840: *vide ante*, Vol. VIII., p. 144.

The Committee resolved accordingly, that the barony of Fitzwalter is now in abeyance between the petitioner, Sir Brook William Bridges, Bart., as grandson and heir of Dame Fanny Bridges, and the descendants (if any) of Jemima Duke; and the chairman was directed to report the resolution to the House.

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INDEX.

AFFRAY. See **ARREST**, 1. **PLEADING**, 1, 2.

APPEAL. See **PRACTICE**.

ARREST. See **PLEADING**, 1, 2.

A private person is not justified in arresting, or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing, or there is reasonable ground for apprehending that he intends to renew it. — *Price v. Seeley*, 28.

BOND OF SURETY.

A party became surety in a bond for the fidelity of a commission agent to his employers. After some time the employers discovered irregularities in the agent's accounts, and put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment, by the employers, of material circumstances affecting the agent's credit prior to the date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding Judge directed the jury, that the concealment, to be undue, must be wilful and intentional, with a view to the advantages the employers were thereby to gain.

Held by the Lords (reversing the judgment of the Court of Session), that the direction was wrong in point of law.

Mere non-communication of circumstances affecting the situation of the parties, material for the surety to know, and within the knowledge of a person obtaining a surety-bond, though not wilful or intentional, or with a view to any advantage to himself, is undue concealment, and will release the surety. — *Railton v. Mathews*, 936.

CHANCERY. See **JURISDICTION**.

* **CHARITY.**

* 960

A testator gave the residue of his estate to an incorporated company in the city of London, upon trust, to apply one moiety of the income to the redemption of British slaves in Turkey and Bar-

bary ; one fourth part to the support of charity schools in the city and suburbs of London, where the education is according to the Church of England, not giving to any one above 20*l.* a year ; and, in consideration of the company's care and pains in the execution of his will, out of the remaining fourth part, to pay 10*l.* a year to such minister of the Church of England as should from time to time officiate in their hospital, and the rest to necessitated decayed freemen of the company, their widows and children, not exceeding 10*l.* a year to any family. And the testator positively forbade his trustees to diminish the capital by giving away any part of it, or to apply the income to any use or uses but those mentioned in his will. The income of a moiety of the residue having for several years been suffered to accumulate in consequence of there being no British slaves in Turkey or Barbary, an information was filed for the administration of the charity estate, including the accumulations of that moiety ; and it appearing that there were no such British slaves to be redeemed, and no other object having been suggested which, in the opinion of the Court, bore any resemblance to the redemption of such slaves, it was declared that, after setting apart a certain sum out of that moiety and its accumulations, to provide a fund for the redemption of any British subjects who might thereafter be held in slavery in Turkey or Barbary, the income of the surplus of that moiety and its accumulations ought to be applied in supporting and assisting charity schools in England and Wales, where the education was according to the Church of England, but not to an amount of more than 20*l.* a year to any one school.

The Lords, affirming that declaration, agreed that the income of the moiety could not be applied to any other purpose more in conformity with the testator's intentions, and with the object of the charity that failed.

A Court of Appeal is not disposed to disturb a decree which depends on the discretion of the Judge, and not upon principle. — *The Ironmongers' Co. v. The Attorney-General*, 908.

CONCEALMENT. See BOND OF SURETY.

* 961 COUNSEL. See CROWN. PRACTICE, 2.

CONSTRUCTION. See POWER. WILL.

CROWN.

1. In a case where a private party had presented an appeal, and the Attorney-General, on behalf of the Crown, had presented a cross-appeal against the same decree, the counsel for the private party were heard fully on both appeal and cross-appeal, and then the counsel for the Crown were heard on both, and the senior counsel for the private party was heard in a general reply ; though the case was one in which, being a matter of revenue, the Crown was directly concerned. — *Drake v. The Attorney-General*, 257.

2. *Seemle*, that the Courts lean strongly towards applications for further

investigation in cases in which property falls to the Crown ; as that generally happens not from want of next of kin, but from failure of legal evidence of their title. — *Robson v. The Attorney-General*, 471.

CY-PRES. See CHARITY.

ECCLESIASTICAL LAW. See MARRIAGE.

ENGLAND. See JURISDICTION.

EVIDENCE. See PEERAGE.

1. The case of a claimant to a peerage depending on the genuineness of entries written in an old prayer-book, and dated 1728 and 1729, several witnesses, whose occupations for a long time made them so conversant with manuscripts of different ages that they could take on themselves to name the period in which any manuscript up to the year 1700 was written, were all of opinion that the entries were written in the early part and before the middle of the last century, and at or about the period of their date.

Held, that such evidence is but small testimony, hardly entitled to any weight, especially when the book containing the entries was not satisfactorily identified. — *Tracy Peerage*, 154.

2. A claimant, after his case was referred to the House of Lords, and evidence taken on it, presented an additional case, alleging an inscription on a tombstone in a churchyard in Ireland ; which, if proved, would sustain his claim. The tombstone could not be produced. Several witnesses from the neighbourhood swore positively that they saw the tombstone and inscription about twenty years ago. There was no material discrepancy in their statements, nor were any witnesses called to contradict them.

* *Held*, that the evidence of the existence of the tombstone or * 962 of the inscription was not sufficient ; and that the neglect of the claimant to produce this material part of his case earlier induced a suspicion of fraud ; which could not be removed without the production of the tombstone, or of other witnesses of greater credit from the neighbourhood. — *Id. ibid.*

3. On a claim to an ancient peerage, a family pedigree, produced from the proper custody, and purporting to have been made by an ancestor of the claimant before the year 1751, was offered in evidence, on proof of the handwriting, by a witness who had been for many years inspector of franks and of official correspondence ; and who said that, from a few inspections he had of two or three of the documents which were proved to be of the same ancestor's writing, he had formed in his mind such a standard of the character of his handwriting as to be able, without immediate comparison with those documents, to say whether any other document that might be produced to him was or was not in the same handwriting.

Held, that the evidence was inadmissible. — *The Fitzwalter Peerage*, 193.

4. That where an accused person is supposed to be insane, a medical man, who has been present in Court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong.— *M'Naghten's Case*, 200.

5. The residuary estate of a testator, who died in 1785, was paid into the exchequer in 1794, under a decree in an administration suit, establishing the right of the Crown thereto, for want of heirs or next of kin of the testator. Parties claiming title to the fund in both characters in 1825 were permitted to go before the Master, for the purpose of making out their claim. In support of their title they produced a narrative in the handwriting of J. T. (found in his repositories at his death in 1792, not made public in his lifetime), containing a genealogical account of his family, of which it represented the testator to have been a member; it purported to be founded chiefly on hearsay, and not to be perfect, and it was erroneous in many particulars. The testator, in his will, declared that he had no living relation, and that J. T., to whom he left a legacy, was not a relation. The narrative was admitted in evidence upon the trial of an issue, directed
 * 963 * by the Court of Chancery, to ascertain whether the claimants were next of kin of the testator. The verdict being against them, the Court refused a new trial.

The House of Lords affirmed that judgment, and disposed of the claimants' case on the merits, on the ground that they had no material new evidence to give, and that the narrative, taken in conjunction with the testator's will, negatived their title. — *Robson v. The Attorney-General*, 471.

6. *Quære*, whether the narrative was legally admissible in evidence in Courts of Equity. — *Id. ibid.*

7. A copy of a will produced from the Prerogative-Office was received, after proof that searches had been made for the original, and that the practice in the office, at the time of the date of the will, was to give out the original wills after making copies. — *The Fitzwalter Peerage*, 948.

8. An old attested copy of a deed of settlement, produced from the proper custody, was received, after proof of unsuccessful searches for the original, and proof that the possession of the estates comprised in the settlement went with it. — *Id. ibid.*

9. *Held* also, that the claimant's solicitor, who said he had acquired a knowledge of the character of the ancestor's handwriting from having had occasion from time to time, in the course of his business for the claimant, to examine several deeds and other documents written or signed by the ancestor, and which came to the claimant together with property formerly belonging to that ancestor, was a competent witness to prove the handwriting of the pedigree. — *Id. ibid.*

10. The wife of a peer of the realm left him in 1808, a year after their marriage, and instituted a suit in the Ecclesiastical Court for nullity of the marriage *propter impotentiam*. Dropping that suit soon afterwards, she went to live with another man, assuming the character of his wife by a marriage in Scotland, and during many years' cohabitation with him had several children, who were named after him and educated as his children; but in 1823 they and their mother assumed the name and titles of the peer. He generally lived abroad, had no access to his wife since she left him, but knew of her infidelity, and took no proceedings to dissolve their marriage or illegitimate the children. Upon the petition of his brother, heir presumptive to his titles, stating those facts, and alleging that the peer was likely to survive all the * witnesses to them, and praying protection to * 964 the descent of the titles —

The House of Lords *held* that the petitioner — although by law he might perpetuate evidence, regarding titles of honour, in Chancery — was entitled to have a private Act of Parliament; and on proof, to the satisfaction of both Houses of Parliament, of the facts above stated, an Act was passed to declare the wife's children not to be the children of the peer, but without dissolving the marriage. — *The Townshend Peerage*, 289.

INFANT. See JURISDICTION. PLEADING, 3.

INSANITY.

1. *Semble*, that notwithstanding a party accused did an act, which was in itself criminal, under the influence of insane delusion, with a view of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time that he was acting contrary to law. — *M'Naghten's Case*, 200.
2. That if the accused was conscious that the act was one which he ought not to do; and if the act was at the same time contrary to law, he is punishable. In all cases of this kind the jurors ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong. — *Id. ibid.*
3. That a party labouring under a partial delusion must be considered in the same situation, as to responsibility, as if the facts, in respect to which the delusion exists, were real. — *Id. ibid.*
4. That where an accused person is supposed to be insane, a medical man, who has been present in Court and heard the evidence, may

be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong. — *Id. ibid.*

IRELAND. See MARRIAGE. SCIRE FACIAS. STATUTES.

* 965 JUDGES.

The House of Lords has a right to require the Judges to answer abstract questions of existing law. — *M'Naghten's Case*, 200.

JUDGMENTS. See PLEADING. SCIRE FACIAS. STATUTES.

JURIES, DIRECTIONS TO. See BOND. INSANITY. SURETY.

JURISDICTION.

1. A Scotchman, by deed duly made in the Scotch form, appointed his wife and eight other persons—all domiciled and resident in Scotland—to be tutors and curators of his infant daughter. Upon his death, his widow and four only of the eight accepted the trusts of the deed. The widow afterwards, with consent of her cotrustees, brought the infant to England, and after residing for three years in various places there, for the health of both, the widow died, recommending the infant to the care of the grandfather, who was then residing in England. The grandfather filed a bill in Chancery, in the infant's name, for the sole purpose of making her a ward of Court, and preventing her removal to Scotland; and upon a contest arising between him and the Scotch tutors for the guardianship of the infant, the Lord Chancellor made an order, in the usual form, referring it to the Master to approve of proper persons to be guardians.

Held by the Lords (affirming that order) —

1. That the Scotch testamentary tutors were not testamentary guardians in England, according to the Act 12 Char. 2, c. 24.
 2. That the Court had jurisdiction to appoint guardians to the infant, although her domicile and all her property were situated in Scotland.
 3. That the Court was bound to appoint guardians to the infant, she being made a ward by the mere filing of the bill; and although the Scotch testamentary tutors had the exclusive control of all her property, and were answerable to the Scotch Courts only, they had no authority over the infant in England, nor power to protect her; nor were entitled, by virtue of the deed of appointment, or by international law, to be confirmed or appointed her guardians in England. (*Dissentientibus* Lord BROUGHAM and Lord CAMPBELL.)
 4. That persons residing out of the jurisdiction may, if otherwise qualified, be appointed guardians jointly with a person * who resides permanently within the jurisdiction. — *Johnstone v. Beattie*, 42.
- * 966
2. *Quære*, whether a bill filed to make an infant a ward of Court ought not to allege some right or claim of the infant to property within the jurisdiction, although untruly. — *Id. ibid.*

LEASE. See WILL.

A will devising real estate gave a power to the devisees for life to demise and lease the same for any term not exceeding twenty-one years in possession, "so as upon every such lease there should be reserved and made payable, during the continuance thereof, the best improved yearly rent that could be reasonably had for the same, without taking any sum of money by way of fine or income for or in respect of such lease." The first devisee for life, in exercise of this power, made a lease for twenty-one years from the 11th of October, 1833, at the yearly rent of 903*l.*, payable by equal half-yearly payments, on the 6th of April and 11th of October in every year, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st of August next before the determination of the said term.

Held by the Lords (concurring in the opinion of a majority of the Judges, and reversing the judgment of the Exchequer Chamber), that the lease was a valid execution of the power. — *Rutland v. Wythe*, 419.

LEGACY DUTY.

1. A testator devised, by two testamentary papers, his real and personal estates to trustees. In the first paper he declared the trusts, and created a power of sale in the following terms: "To sell and dispose of the lands, mills, teinds, woods, fishings, messuages, &c., hereby generally and particularly disposed to them, &c., on such conditions and at such prices as they shall think fit." And he granted full power to convey. The paper then went on thus: "Declaring always, &c., that my said trustees shall by their acceptance hereof be bound and obliged, after the sale of the said lands, teinds, and others before disposed, which I recommend to them to be done as soon as convenient after this trust opens upon them, to satisfy and pay all my lawful and just debts." By a second testamentary paper reciting the first, he said that by the recited paper he had disposed of his heritable and movable * estates to trustees on the * 967 trusts therein mentioned, and "amongst others, my trustees are required to turn my means and effects, thereby conveyed in trust, into money;" and he gave directions accordingly. He further directed, that in case he should die leaving an heir of his body, his trustees should employ the trust funds for the use of such heir; and that as soon as such heir should attain majority or be married, the trustees should "denude themselves of the whole trust and funds" in favour of such heir, but to return to the trustees in case of failure of heirs of his body, without disposing of the same.

Held, that the testamentary papers must be construed as amounting not merely to a power of sale for the purposes of the trust, but to a direction to sell in case the testator should die without leaving any heir of his body living at the time of his death;

and *held*, therefore, that though in fact the real estate was not sold, the positive direction to sell rendered it liable to the legacy duty.— *Williamson v. The Lord Advocate*, 1.

2. J. R. by will directed his real estates to be sold and converted into personalty ; and after giving certain legacies, he thereby vested the residue in trustees, for the use of his daughter J. A. P. for life, with power to her to appoint the same by will, but expressly excluding from the benefit of that appointment certain persons named or indicated in his will ; and directed that, in default of appointment, or so far as such appointment should be incomplete, the residue should be held by the trustees in trust for the next of kin of D. R. This power was exercised by J. A. P. by her will, partly in favour of the next of kin of D. R., and partly in favour of other persons.

Held (affirming the decree of the Master of the Rolls) —

First, that she must be considered to have had, notwithstanding the special exclusions in her father's will, an absolute power of appointment within the meaning of the 36 Geo. 3, c. 52; and that consequently legacy duty was payable by her appointees, upon the bequests made by her, as being, under the 7th section, bequests made by her out of personal estate which she had the power of disposing of.

Secondly, that this property, though subject to her power of disposal, was not so strictly her own property, as to render it, under the 18th section, liable to probate duty under her will, as property

- * 968 * which she had died possessed of or entitled to. — *Drake v. The Attorney-General*, 257.

LIMITATION. See **SETTLEMENT**.

By a marriage settlement, the wife's portion was limited to her for life, remainder to her husband for life, remainder to the children of the marriage, to be vested at twenty-one or marriage, and in case none should attain that age or marry, then in trust for the brothers and sisters of the wife or their issue, as she should appoint ; and in default of appointment, in trust for her next of kin.

Held, that the child of the marriage was not excluded from taking under the ultimate limitation. — *Withy v. Mangles*, 215.

MARRIAGE. See **PEERAGE**, 4.

A., a member of the Established Church in Ireland, went, accompanied by B., a Presbyterian, to the house of C., a regularly placed minister of the Presbyterians of the parish where C. resided, and there entered into a present contract of marriage with the said B. ; the minister performing a religious ceremony between them, according to the rites of the Presbyterian Church. A. and B. lived together for some time as man and wife ; A. afterwards, B. being still alive, married another person, in a parish church in England. *Quære*, whether the first contract, thus en-

tered into, was sufficiently a marriage to support an indictment against A. for bigamy?

Lord BROUGHAM, Lord DENMAN, and Lord CAMPBELL were of opinion that it was : the Lord Chancellor, Lord COTTENHAM, and Lord ABINGER, were of opinion that it was not. The Lords being thus divided, the rule “*semper præsumitur pro negante*” applied, and judgment was given for the defendant in error. — *The Queen v. Millis*, 534.

NEXT OF KIN. See EVIDENCE. PRACTICE.

By the settlement made on the marriage of E. M., the ultimate limitation of a sum of 10,000*l.*, which her father thereby covenanted to pay, was “to such person or persons as at the time of her death should be her next of kin.” E. M. died, leaving her husband and a child of the marriage, and her own father and mother, surviving.

* *Held* (affirming a decree of the Master of the Rolls), that the * 969 father, mother, and child of E. M. were equally her next of kin, and were entitled, under the limitation, to the 10,000*l.* in joint tenancy. — *Withy v. Mangles*, 215.

PEERAGE. See EVIDENCE.

1. A statement in a claim of peerage made by the claimant's father, who at the moment of making it was himself a claimant, and an affidavit made in support of the claim, were admitted, as representations made by the claimant and as coming through him before the committee, to be read in answer to his claim. — *Tracy Peerage*, 167.
2. Any document laid by a claimant before the Attorney-General, and with his report referred to the House, becomes evidence. — *Id.* 173.
3. On a claim to an ancient peerage, a family pedigree, produced from the proper custody, and purporting to have been made by an ancestor of the claimant before the year 1751, was offered in evidence, on proof of the handwriting, by a witness who had been for many years inspector of franks and of official correspondence ; and who said that, from a few inspections he had of two or three other documents which were proved to be of the same ancestor's writing, he had formed in his mind such a standard of the character of his handwriting as to be able, without immediate comparison with those documents, to say whether any other document that might be produced to him was or was not in the same handwriting ;—

Held, that the evidence was inadmissible.

Held, that the claimant's solicitor, who said he had acquired a knowledge of the character of the ancestor's handwriting from having had occasion from time to time, in the course of his business for

the claimant, to examine several deeds and other documents written or signed by the ancestor, and which came to the claimant together with property formerly belonging to that ancestor, was a competent witness to prove the handwriting of the pedigree. — *The Fitzwalter Peerage*, 193.

4. The wife of a peer of the realm left him in 1808, a year after their marriage, and instituted a suit in the Ecclesiastical Court for nullity of the marriage *propter impotentiam*. Dropping that suit soon afterwards, she went to live with another man, assuming the character of his wife by a marriage in Scotland, and during many years' cohabitation with * him had several children, who were named after him and educated as his children ; but in 1823 they and their mother assumed the name and titles of the peer. He generally lived abroad, had no access to his wife after she left him, but knew of her infidelity, and took no proceedings to dissolve their marriage or to illegitimate the children. Upon the petition of his brother, heir presumptive to his titles, stating those facts, and alleging that the peer was likely to survive all the witnesses to them, and praying protection to the descent of the titles —

The House of Lords *held* that the petitioner — although by law he might perpetuate evidence regarding titles of honour in Chancery — was entitled to have a private Act of Parliament ; and on proof, to the satisfaction of both Houses of Parliament, of the facts above stated, an Act was passed to declare the wife's children not to be the children of the peer, but without dissolving the marriage. — *The Townshend Peerage*, 289.

An ancient barony in fee, after having been enjoyed by the lineal heirs of the first baron successively for centuries, then becoming dormant for some time, was claimed and again enjoyed by one who, after full investigation, was found to be the heir of the first and last barons. It afterwards fell into abeyance among his co-heirs.

Semble, that it is not necessary for one of these coheirs claiming the barony, to give proofs of the first creation, and of the divers mesne descents.

Semble, that on a claim to an ancient barony, minutes of proceedings on a former claim, before the King in council, are admissible in evidence in the House of Lords. — *The Fitzwalter Peerage*, 948.

A long abeyance of a dignity, if satisfactorily explained, is no objection to a claim.

A copy of a will produced from the Prerogative-Office was received in evidence in a peerage case, after proof that unsuccessful search had been made for the original, and that the practice in the office at the time of the date of the will was to give out the original wills after taking copies. — *Id. ibid.*

An old attested copy of a deed of settlement, produced from the proper custody, was received, after proof of unsuccessful searches for the

original, and proof that the possession of the estates comprised in the settlement went with it. — *The Fitzwalter Peerage Case*, 948.

* PLEADING.

* 971

1. A plea, justifying an arrest for an affray without warrant, ought to contain a direct averment that there was an affray or a breach of the peace continuing at the time of the arrest, or a well-founded apprehension of its renewal. — *Price v. Seeley*, 28.
2. A plea of justification to an action of trespass for assault and false imprisonment, — after stating that defendants were in lawful possession of a yard, and were there erecting a wall by their servants ; that plaintiff entered the yard and upon the wall, and made a great noise, disturbance, and affray, ill-treated defendants, threw down their servants so employed, and obstructed the erection of the wall, in breach of the peace ; then averred a requisition by defendants to plaintiff to depart, and his refusal and continuance; whereupon defendants and their servants gently removed him, and he violently resisted, and assaulted one of the defendants in so doing, — proceeded thus : that plaintiff then and immediately afterwards, and just before the said time when, &c., with force, &c., again broke and entered the yard and got upon the wall, and again made a great noise, disturbance, and affray therein, and threatened to assault, insulted, and ill-treated and showed fight to defendants, and then again forcibly obstructed the further erection of the said wall, and threw down part thereof, &c., in breach of the peace ; whereupon defendants, having view of the offences and misconduct of plaintiff last aforesaid, in order to prevent such breach of the peace, &c., then and there gave charge of the plaintiff to a police constable, who then saw the misconduct of plaintiff, to take him before a justice ; and the policeman took him before a justice.

! *Held*, that these were sufficiently positive averments of a continuing breach of the peace from the commencement until the plaintiff was given in charge, or amounted to a necessary implication of a well-founded apprehension that it would be renewed. — *Id. ibid.*

3. *Quære*, whether a bill filed to make an infant a ward of Court ought not to allege some right or claim of the infant to property within the jurisdiction, although untruly. — *Johnstone v. Beattie*, 42.
4. To a writ of *scire facias*, issued in 1837 by the executors of the conusee of a judgment recovered in 1810, against the heirs and terre-tenants of the conusee, one of the terre-tenants *pleaded the 40th section of the Statute 3 & 4 Will. 4, * 972 c. 27; to which the executors replied a judgment of revivor, recovered by themselves within twenty years before the issuing of the *scire facias*.

Held by the Lords (agreeing with the unanimous opinion of the Judges of England, and reversing a judgment of the Court of Exchequer Chamber in Ireland) —

- 1st. That the plea was a sufficient answer to the claim stated in the writ.
- 2d. That the replication was a departure from the writ, and therefore bad on general demurrer.
- 3d. That a new right accrued to the executors by the judgment of revivor recovered by themselves. — *Farran v. Beresford*, 319.
2. *Seemle*, that if the executors had issued the *scire facias* on the judgment revived by them within the twenty years, the statute would not have barred the claim. — *Id. ibid.*
3. *Seemle*, that the Irish Statute 8 Geo. 1, c. 4, § 2, is repealed, so far as judgments are concerned, by the Statute 3 & 4 Will. 4, c. 87, § 40. — *Id. ibid.*

POWER. See **WILL.**

1. Lands were limited to such uses, &c., as L. H. W. should appoint by her last will and testament, in writing, to be by her *signed, sealed, and published in the presence of, and attested by, three or more credible witnesses*. L. H. W. signed and sealed an instrument (before Statute 1 Vict. c. 26) containing an appointment commencing thus: "I, L. H. W., do publish and declare this to be my last will and testament;" and ending thus: "I declare this only to be my last will and testament: in witness whereof I have, to this my last will and testament, set my hand and seal, the 12th day of September," &c. The attestation was thus: "Witness, C. B., E. B., A. B."

Held by the House of Lords (reversing a judgment of the Court of Exchequer Chamber, and concurring in the opinion of the majority of the Judges), that the attestation was sufficient, and that the power of appointment was well executed. — *Burdett v. Spilsbury*, 340.

2. A will devising real estate gave a power to the devisees for life to demise and lease the same for any term not exceeding twenty-one * years in possession, "so as upon every such lease there should be reserved and made payable, during the continuance thereof, the best improved yearly rent that could be reasonably had for the same, without taking any sum of money by way of fine or income for or in respect of such lease." The first devisee for life, in exercise of this power, made a lease for twenty-one years from the 11th of October, 1833, at the yearly rent of 903*l.*, payable by equal half-yearly payments, on the 6th of April and 11th of October in every year, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st of August next before the determination of the said term.

Held by the Lords (concurring in the opinions of the majority of the Judges, and reversing the judgment of the Exchequer Chamber), that the lease was a valid execution of the power. — *Rutland v. Wythe*, 419.

PRACTICE. See **PLEADING.** **SCIRE FACIAS.** **STATUTE.**

1. A cause had been heard in the Court of Chancery in Ireland, and a

decree made ; the cause was reheard, and the decree affirmed. The party who had failed in the suit petitioned for a second rehearing, and undertook not to appeal from the decision of the Lord Chancellor on such rehearing, but to abide by it. The Lord Chancellor affirmed the original decree, and in the last decree set forth the undertaking in consequence of which he had reheard the cause. The party who had given the undertaking brought an appeal. The Lords, in their discretion, refused to hear it. — *Woodmason v. Doyne*, 22.

2. *Quære*, whether the bill filed to make an infant a ward of Court ought not to allege some right or claim of the infant to property within the jurisdiction, although untruly. — *Johnstone v. Beattie*, 42.
3. The Standing Order, No. 58, directing "that no counsel shall sign an appeal to this House unless he was of counsel in the same cause in the Courts below, or attends as counsel at the hearing at the bar of this House," is not to be departed from, although there may be exceptions allowed. — *Price v. Seeley*, 28.
4. The House of Lords has a right to require the Judges to answer abstract questions of existing law. — *M'Naghten's Case*, 200.
- * 5. Upon appeal against a decree dismissing a bill, the respondent may, in supporting the decree, raise points in his case and argument that were not raised in the Court below. — *Withy v. Mangles*, 215. * 974
6. In a case where a private party had presented an appeal, and the Attorney-General, on behalf of the Crown, had presented a cross-appeal against the same decree, the counsel for the private party were heard continuously on both appeal and cross-appeal, and then the counsel for the Crown were heard on both, and the senior counsel for the private party was heard in a general reply ; though the case was one in which, being a matter of revenue, the Crown was directly concerned. — *Drake v. The Attorney-General*, 257.
7. *Semble*, the Courts lean strongly towards applications for further investigation, in cases in which property falls to the Crown ; as that generally happens, not from want of next of kin, but from failure of legal evidence of their title. — *Robson v. The Attorney-General*, 471.
8. It is an inflexible rule of the House to hear only two counsel for each party in any one case ; and the House will not avoid the effect of this rule by permitting one senior and one junior counsel to be heard in the opening, and a third counsel to reply. — *The Queen v. Millis*, 534.
9. A Court of Appeal is not disposed to disturb a decree which depends on the discretion of the Judge, and not upon principle. — *Ironmongers' Company v. The Attorney-General*, 908.

PRINCIPAL AND SURETY. See BOND.

PRIVATE ACT OF PARLIAMENT. See PEERAGE, 4.
PROBATE DUTY.

J. R. by will directed his real estates to be sold and converted into personalty ; and after giving certain legacies, he thereby vested the residue in trustees, for the use of his daughter J. A. P., for life, with power to her to appoint the same by will, but expressly excluding from the benefit of that appointment certain persons named or indicated in his will ; and he directed, that in default of appointment, or so far as such appointment should be incomplete, the residue should be held by the trustees in trust for the next of kin of D. R. This power was exercised by J. A. P. by her will, partly in favour of the next of kin of D. R., and partly in favour of other persons.

* 975 * *Held* (affirming the decree of the Master of the Rolls), —

First, that she must be considered to have had, notwithstanding the special exclusions in her father's will, an absolute power of appointment, within the meaning of the 36 Geo. 3, c. 52 ; and that consequently legacy duty was payable by her appointees, upon the bequests made by her, as being, under the 7th section, bequests made by her out of personal estate which she had the power of disposing of.

Secondly, that this property though subject to her power of disposal, was not so strictly her own property, as to render it, under the 18th section, liable to probate duty under her will, as property which she had died possessed of or entitled to.— *Drake v. The Attorney-General*, 257.

REHEARING. See PRACTICE, 1.

RELATIONSHIP. See NEXT OF KIN.

REVENUE. See CROWN. LEGACY DUTY. PRACTICE, 6. PROBATE DUTY.

SALE, DIRECTIONS TO SELL. See WILL, 1.

SCIRE FACIAS. See STATUTES.

To a writ of *scire facias*, issued in 1837 by the executors of the conu-see of a judgment recovered in 1810, against the heirs and terre-tenants of the conusor, one of the terre-tenants pleaded the 40th section of the Statute 3 & 4 Will. 4, c. 27 ; to which the executors replied a judgment of revivor, recovered by themselves within twenty years before the issuing of the *scire facias*.

Held by the Lords (agreeing with the unanimous opinion of the Judges of England, and reversing a judgment of the Court of Exchequer Chamber in Ireland). —

1st. That the plea was a sufficient answer to the claim stated in the writ.

2d. That the replication was a departure from the writ, and therefore bad on general demurrer.

3d. That a new right accrued to the executors by the judgment of revivor, recovered by themselves. — *Farran v. Beresford*, 319.

Semble, that if the executors had issued a *scire facias* on the judgment revived by them within the twenty years, the statute would not have barred the claim. — *Id. ibid.*

* *Semble*, that the Irish Statute, 8 Geo. 1, c. 4, § 2, is repealed, * 976 so far as judgments are concerned, by the Statute 3 & 4 Will. 4, c. 27, § 40. — *Id. ibid.*

SCOTLAND. See JURISDICTION.

SETTLEMENT. See EVIDENCE. LIMITATION. NEXT OF KIN.

By the settlement made on the marriage of E. M., the ultimate limitation of a sum of 10,000*l.*, which her father thereby covenanted to pay, was "to such person or persons as at the time of her death should be her next of kin." E. M. died, leaving her husband and a child of the marriage, and her own father and mother surviving.

Held (affirming a decree of the Master of the Rolls), that the father, mother, and child of E. M., were equally her next of kin, and were entitled, under the limitation, to the 10,000*l.* in joint tenancy. — *Withy v. Mangles*, 215.

STATUTES. See LEGACY DUTY. PROBATE DUTY. TUTOR. WILL.

Semble, that the Irish Statute, 8 Geo. 1, c. 4, § 2, is repealed so far as judgments are concerned, by the Statute 3 & 4 Will. 4, c. 27, § 40. — *Farran v. Beresford*, 819.

SURETY.

A party became surety in a bond for the fidelity of a commission agent to his employers. After some time, the employers discovered irregularities in the agent's accounts, and put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment by the employers of material circumstances affecting the agent's credit, prior to the date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue, whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding Judge directed the jury, that the concealment, to be undue, must be wilful and intentional, with a view to the advantages the employers were thereby to gain.

Held by the Lords (reversing the judgment of the Court of Session), that the direction was wrong in point of law.

Mere non-communication of circumstances affecting the situation of the parties, material to be known to the surety, and within the knowledge of a person obtaining a surety bond, * though * 977 not wilful or intentional, or with a view to any advantage to himself, is undue concealment, and may release the surety. — *Railton v. Mathews*, 936.

TUTOR.

A Scotchman, by deed, duly made in the Scotch form, appointed his wife and eight other persons, all domiciled and resident in Scot-

land, to be tutors and curators of his infant daughter. Upon his death his widow and four only of the eight accepted the trusts of the deed. The widow afterwards, with consent of her co-trustees, brought the infant to England, and after residing for three years in various places there, for the health of both, the widow died, recommending the infant to the care of her grandfather, who was then residing in England. The grandfather filed a bill in Chancery in the infant's name, for the sole purpose of making her a ward of Court, and preventing her removal to Scotland; and upon a contest arising between him and the Scotch tutors for the guardianship of the infant, the Lord Chancellor made an order in the usual form, referring it to the Master to approve of proper persons to be guardians.

Held by the Lords (affirming that order), —

- 1st. That the Scotch testamentary tutors were not testamentary guardians in England, according to the Act 12 Char. 2, c. 27.
- ✓ 2d. That the Court had jurisdiction to appoint guardians to the infant, although her domicile and all her property were situated in Scotland.
- 3d. That the Court was bound to appoint guardians to the infant, she being made a ward by the mere filing of the bill; and although the Scotch testamentary tutors had the exclusive control of all her property, and were answerable to the Scotch Courts only, they had no authority over the infant in England, nor power to protect her; nor were entitled, by virtue of the deed of appointment, or by international law, to be confirmed or appointed her guardians in England. (*Dissentientibus* Lord BROUGHAM and Lord CAMPBELL.)
- 4th. That persons residing out of the jurisdiction may, if otherwise qualified, be appointed guardians jointly with a person who resides permanently within the jurisdiction. — *Johnstone v. Beattie*, 42.

UNDERTAKING. See PRACTICE, 1.

* 978 * WILL. See EVIDENCE. LEASE. POWER.

1. A testator devised, by two testamentary papers, his real and personal estates to trustees. In the first paper he declared the trusts, and among others he gave them a power of sale in the following terms: "to sell and dispose of the lands, mills, teinds, woods, fishings, messuages, tenements, and hereditaments, and others hereby generally and particularly disposed to them, &c., on such conditions and at such prices as they shall think fit." To render these sales effectual, he granted full power to convey, &c. The paper then went on thus: "Declaring always, &c., that my said trustees shall, by their acceptance hereof, be bound and obliged after the sale of the said lands, teinds, and others before disposed, which I recommend to them to be done as

soon as convenient after this trust opens upon them, to satisfy and pay all my lawful and just debts," &c. By a second testamentary paper reciting the first, he said that by the recited paper he had disposed of his heritable and movable estates to trustees on the trusts therein mentioned : " Amongst others, my trustees are required to turn my means and effects thereby conveyed in trust, into money." And he gave directions accordingly, adding that in case he should die leaving an heir of his body, he directed his trustees to employ the trust funds for the use of such heir ; that as soon as such heir should attain majority or be married, the trustees should " denude themselves of the whole trust and funds " in favour of such heir, but to return to the trustees in case of failure of heirs of his body.

Held, that the testamentary papers must be construed as amounting not merely to a power of sale for the purposes of the trust, but to a positive direction to sell in case the testator should die without leaving any heir of his body living at the time of his death.—*Williamson v. The Lord Advocate*, 1.

2. J. R. by will directed his real estates to be sold and converted into personalty ; and after giving certain legacies, he thereby vested the residue in trustees, for the use of his daughter J. A. P. for life, with power to her to appoint the same by will, but expressly excluding from the benefit of that appointment certain persons named or indicated in his will ; and directed, that in default of appointment, or so far as such appointment should be incomplete, the residue should be *held by the *979 trustees in trust for the next of kin of D. R. This power was exercised by J. A. P. by her will, partly in favour of the next of kin of D. R., and partly in favour of other persons.

Held (affirming the decree of the Master of the Rolls), first, that she must be considered to have had, notwithstanding the special exclusions in her father's will, an absolute power of appointment within the meaning of the 36 Geo. 3, c. 52 ; and that consequently legacy duty was payable by her appointees, upon the bequests made by her, as being, under the 7th section, bequests made by her out of personal estate which she had the power of disposing of ; but, secondly, that this property, though subject to her power of disposal, was not so strictly her own property as to render it, under the 18th section, liable to probate duty under her will, as property which she had died possessed of or entitled to. — *Drake v. The Attorney-General*, 257.

3. Lands were limited to such uses, &c., as L. H. W. should appoint by her last will and testament, in writing, to be by her signed, sealed, and published in the presence of, and attested by three or more credible witnesses. L. H. W. signed and sealed an instrument (before Stat. 1 Vict. c. 26) containing an appointment commencing thus : " I, L. H. W., do publish and declare this to be my last will and testament ; " and ending thus : " I declare

this only to be my last will and testament : in witness whereof I have, to this my last will and testament, set my hand and seal, the 12th day of September," &c. The attestation was thus : " Witness, C. B., E. B., A. B."

Held by the House of Lords (reversing a judgment of the Court of Exchequer Chamber, and concurring in the opinion of the majority of the Judges), that the attestation was sufficient, and that the power of appointment was well executed. — *Burdett v. Spilsbury*, 340.

4. A testator left all his personal estate subject to legacies, and all his houses, gardens, parks, and woods, and all his landed estates, to his wife for her life, and then to the eldest son of G. B., and afterwards to G. B.'s second, third, or any later sons he might have by the testator's niece A., and then to the eldest son and other sons successively of the Earl of B. by the testator's niece C.; but all these to be subject to out-payments and legacies by the testator's will given; and if they and the conditions of his will were not complied with * exactly, he left all the advantages of it to the next person in succession, subject to the legacies and so on, unless they were discharged. The testator, by codicils to the will, gave numerous legacies and annuities, upon the non-payment of which he declared repeatedly and in various forms of expression that the persons taking his personal estate should be subject to the penalties in the will. G. B. had several sons living at the death of the testator.

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Held, that the eldest son of G. B. took the personal estate absolutely, subject to the prior life-estate, and to the legacies and annuities given by the will and codicils. — *Hoare v. Byng*, 508.

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END OF THE TENTH VOLUME.

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